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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1754~~ 70-211

J. C. PENNEY COMPANY, INC., *Petitioner,*

v.

THE UNITED STATES TREASURY DEPARTMENT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE UNITED STATES TREASURY DEPARTMENT, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, J. C. Penney Company, Inc., petitions for a writ of certiorari to review the judgment rendered herein on March 1, 1971, by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is not yet reported, appears as Apendix A to this Petition. The opinion of the United States District Court for the Southern District of New York, reported at 319 F. Supp. 1023, appears as Appendix B.

JURISDICTION

The judgment of the Second Circuit Court of Appeals for which review is sought was entered on March 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Do Federal District Courts have the same jurisdiction to prevent the denial of fundamental procedural rights guaranteed under the Fifth Amendment to the Constitution and the Administrative Procedure Act in administrative adjudicative proceedings under the Antidumping Act of 1921, as they do in administrative adjudicative proceedings conducted pursuant to other Federal statutes?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal constitutional provision involved is the Due Process Clause of the Fifth Amendment to the Constitution of the United States, which is set forth as Appendix C.

The following Federal statutes and regulations are involved: 19 U.S.C. § 160 *et seq.* (the Antidumping Act of 1921); 19 U.S.C. § 1514 (the Tariff Act of

1930); 5 U.S.C. § 551 *et seq.* (the Administrative Procedure Act); 15 U.S.C. §§ 21(c), 21 (d), 78y and 1124; 21 U.S.C. §§ 332-335, 371(e) and 371(f); 26 U.S.C. § 7421; 28 U.S.C. §§ 255, 1331, 1337, 1340, 1361, 1582, 1651, 2201 and 2202; 29 U.S.C. § 159(d); 19 C.F.R. §§ 153.53 and 153.54. The pertinent portions of these provisions are set forth as Appendix D.

STATEMENT OF THE CASE

This case involves an important question concerning the power of the Federal judiciary to protect against the deprivation of fundamental constitutional rights in administrative adjudicative proceedings in general, and under the Antidumping Act of 1921 in particular.

More specifically, during proceedings conducted by respondent following the filing of a complaint alleging that television sets from Japan were being sold in the United States in violation of the Antidumping Act, *supra,* Petitioner and other importers of such television sets were deprived by respondents of their rights:

(1) to obtain a hearing on the record as to the existence of sales at less than fair value ("LTFV" sales) within the meaning of the Antidumping Act;

(2) to cross-examine witnesses with respect to this issue;

(3) to review and respond to information relied upon by the U.S. Department of the Treasury ("Treasury") in deciding to withhold appraisement under the Act and in reaching its finding of LTFV sales;

(4) to know the criteria applied by Treasury in making the foregoing determinations; and

(5) to receive a fair and impartial adjudication on the record free from the taint of actual or apparent prejudgment and bias.

The Due Process Clause of the Constitution and the adjudicatory provisions of the Administrative Procedure Act accord these rights in such administrative proceedings before Treasury under the Antidumping Act of 1921. When Treasury finally and conclusively denied Petitioner's repeated requests that it receive these rights, Petitioner sought relief from respondents' arbitrary and capricious action in the United States District for the Southern District of New York. In so doing, it relied upon a long line of cases consistently recognizing the power of Federal District Courts to intervene in such circumstances to correct fundamental deprivations of procedural rights, even where a statute may specify a means of judicial review which would otherwise be exclusive.

The Courts below ignored the clear body of authority, including decisions of this Court, in both antidumping and other administrative proceedings. Instead, they concluded that the U.S. District Courts have no jurisdiction under any circumstances to entertain suits to correct such fundamental errors. The Courts below took the view that the Customs laws create a "complete system of corrective justice." They thus proposed a novel jurisdictional principle permitting only the Customs Court to consider the deprivation of basic procedural rights, regardless of the extraordinary circumstances prompting the complaint, if the case relates in any way to a proceeding that may ultimately

involve the customs laws. It is difficult to understand how the Courts below could conclude that the Customs laws create such a "complete system of corrective justice" in spite of the facts that: (1) Petitioner is thereby deprived of all present remedy and incurs irreparable present injury because the Customs Court cannot hear its claim until a later time, if ever; (2) both Petitioner and the Customs Court lack any record on which Treasury's action can be challenged or meaningful review can be based; (3) the Customs Court has indicated that it lacks power at any time to grant the only relief adequate to the case, and in fact there may be circumstances in which the Customs Court's restrictive view of its jurisdiction may cause it to refuse to hear the suit at all; (4) Petitioner's claim has nothing to do with customs law, but deals only with constitutional safeguards required in administrative adjudicative proceedings; and (5) the administrative process may be severely hampered by deferring the resolution of the issue.

The deficiencies in the review procedure described above clearly demonstrate the extent to which the Courts below erred in adopting the view that the Customs Court offers a "complete system of corrective justice." Review in the Customs Court cannot redress Petitioner's injuries resulting from Treasury's improper action. During the entire period between Treasury's withholding of appraisement in September of 1970 and the eventual review of Petitioner's protest in the Customs Court (a period which will comprise at least two years), Petitioner's normal business activities are disrupted in the following respects, all of which stem directly from the LTFV determination: (1) Petitioner is unable to make informed decisions as to

retail pricing since it does not know what customs duties it may ultimately have to pay on imported Japanese television sets or the criteria on which such duties will be based; (2) Petitioner's Japanese suppliers may revise their prices upward, either in an attempt to avoid possible dumping margins or for other reasons, and Treasury's refusal to disclose the applicable facts or criteria places Petitioner at a severe disadvantage in negotiating with those suppliers; (3) Petitioner is unable to compete as usual with importers who purchase from other Japanese suppliers whose pricing margins may have been found by Treasury to be less or non-existent; and (4) collateral litigation based largely on the LTFV determination, such as the two U.S. antitrust suits currently pending against the Japanese television manufacturers, could effectively eliminate Petitioner's Japanese source of supply. Because of the delay involved, subsequent Customs Court review of the LTFV decision—even if it resulted in judgment in Petitioner's favor—would be inadequate to repair Petitioner's injury from any of these causes.

The Customs Court has consistently alleged that it lacks equity power. If that Court did not consider itself so inhibited, it could exercise its authority to deal with all shipments rather than limiting its decisions to reach only single shipments. Moreover this limited view of its powers deprives the Customs Court of any adequate means to compel Treasury to accord the procedural rights required by the Constitution or to direct Treasury to reach its LTFV determination in compliance with statutory criteria.

The action of the Court below has additional significance because Treasury can be expected to invoke it as a precedent for denying fundamental procedural rights in future cases arising under the Antidumping

Act. Treasury has characterized the Japanese television proceeding as the largest, the most complex and the most important in the history of the Act. It is the first major antidumping case involving popular consumer products and sophisticated marketing processes. The precedential quality of Treasury's conduct is reflected in the following summary which provides the basis for the present litigation.

A. The Statutory Scheme

The Antidumping Act of 1921 is intended to prevent merchandise from being exported to the United States at a net ex-factory price (designated by the Act as the "exporter's sales price" or the "purchase price," depending on whether the U.S. importer is related to the foreign exporter) which is less than that at which the merchandise is sold in the country of origin (the "home market" price), if such sales cause or are likely to cause injury to an industry in the United States. The Secretary of the Treasury is charged with the duty of determining whether such sales at less than fair value have occurred. 19 U.S.C. § 160 *et seq.* If the Secretary determines in the affirmative, he is required to notify the United States Tariff Commission, which then determines whether those LTFV sales have injured or are likely to injure a U.S. industry. *Ibid.* If the Tariff Commission finds injury, it so advises the Secretary who thereupon publishes a finding of "dumping" within the meaning of the Act. *Ibid.* Both the Secretary and the Tariff Commission are required to publish their individual determinations in the Federal Register, accompanied by a statement of the reasons therefor. *Ibid.* If dumping is found, all such merchandise entering the United States after the

withholding of appraisement* may be subject to a special dumping duty in the amount of the dumping "margin." This margin equals the difference between the net ex-factory prices of comparable merchandise sold in the United States and in the home market.

After a dumping finding is published, the Customs Bureau undertakes to develop new home market and U.S. market price and cost information for the merchandise in question sold after the date of the withholding of appraisement. If the Bureau determines that special dumping duties are warranted, they are then imposed.

Under Section 210 of the Antidumping Act (19 U.S.C. § 169), the importer can protest the assessment of such duties in the same manner as is set forth under the general customs laws. If the protest is denied, the importer can obtain review of the assessment in the U.S. Customs Court after paying the challenged duty

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* Withholding of appraisement on merchandise [i.e., holding in abeyance the valuation of imports for duty assessment purposes] occurs whenever the Secretary "has reason to believe or suspect" that dumping may be taking place. 19 U.S.C. § 160. The maximum period for withholding appraisement under the antidumping regulations is six months, during which time the Secretary and the Tariff Commission must render their respective determinations as to LTFV sales and injury. Once appraisement is withheld, the merchandise is prohibited from entering the United States unless the importer first posts a bond in an amount determined in the sole discretion of the Bureau of Customs.

With regard to television receivers, Petitioner is required to post a bond, in connection with each entry equal to nine percent of the invoice value. This nine percent figure was arrived at on an arbitrary basis using antiquated 1967 and 1968 price information supplied in connection with the dumping proceeding and, therefore, cannot even be said to be a realistic estimate of actual or potential dumping margins on 1970 shipments.

and filing a summons and complaint. It is by no means clear whether, under such a procedure, the U.S. Customs Court will ever review the propriety of the Secretary's LTFV determination, the Tariff Commission's injury determination, or the dumping finding itself. Moreover, because of the manner in which Treasury conducts its LTFV proceedings, Customs Court review —even where it exists—is illusory. Treasury does not disclose either the facts on which its determination is based or the criteria it applies in reaching its decision. It regularly receives confidential information from parties having an interest in the outcome of the proceeding and it relies on this information without disclosure to parties adversely affected thereby, or without affording interested parties the right to examine witnesses presenting testimony against them.

As a result, there is literally no record of Treasury's action for Petitioner to challenge or for the Customs Court to review. The facts and criteria are unknown and unknowable except to Treasury. In these circumstance, it is understandable why no LTFV determination has even been reversed in the 50-year history of the Act.

B. The Administrative Proceedings

As noted above, the present case arises out of the Treasury Department's antidumping proceedings involving monochrome and color television sets from Japan. This merchandise comprises several hundred million dollars' worth of imports each year. On December 4, 1970, after a two-and-one-half year review of specific price, cost, production and promotional expense data submitted individually by five Japanese exporters and importers in response to a Customs Bureau ques-

tionnaire, Treasury made its LTFV determination and referred the case to the Tariff Commission. The Tariff Commission did not review Treasury determination; instead, it accepted that finding at face value. It also relied on a confidential file, ostensibly containing information as to specific dumping margins, which was transmitted to it by Treasury but was not disclosed to Petitioner. Based on these and other sources (including the confidential results of its own staff investigation which were also not disclosed to Petitioner), the Commission made an affirmative injury determination on March 4, 1971 (Appendix E).

In order to reach its LTFV determination in this case, Treasury must compare the net ex-factory prices of television sets sold in Japan with similar prices of comparable sets manufactured in Japan for sale in the United States. The process of ascertaining net ex-factory prices is highly complex. It requires stripping out sales, marketing, distribution and promotional cost differentials in each market for each television model of each of the five Japanese manufacturers. To the limited extent that it was possible to obtain access to the relevant data, disagreements frequently arose among the parties as to the proper treatment of specific elements of expense. The process was inherently adjudicatory in nature.* It required the interpretation and application of broad statutory standards to specific facts applicable to the five manufacturers. The computation of net ex-factory prices was closely analogous

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* See Davis, *Administrative Law Treatise*, § 7.02. Also compare *Londoner* v. *Denver*, 210 U.S. 373 (1908) with *Bi-Metallic Inv. Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915).

to a cost justification analysis under the Robinson-Patman Act.

Treasury's task was even more difficult than usual because of the sophisticated consumer merchandise involved in the proceeding. This merchandise is marketed very differently from the raw or semi-finished goods which have typically been the subject of antidumping cases in the past. It is also marketed very differently in Japan than in the United States. The Japanese television manufacturer provides numerous services for his dealers and distributors that in the United States are borne by wholesalers and retailers. Moreover, there are significant differences between the Japanese manufacturers regarding discounts, services, and other benefits which they provide to their home market dealers and distributors. Under the Antidumping Act, adjustments must be made for the costs of these services, which are not provided in connection with television sets sold to the United States.

These adjustments have been the major disputed issue in the antidumping proceeding before Treasury. Unless the Petitioner knows the criteria applied by Treasury in determining these adjustments, Petitioner cannot intelligently engage in price negotiations with its Japanese suppliers. Moreover, Petitioner will be prejudiced in its competitive position with respect to other domestic retailers who buy from other Japanese manufacturers since there may be differences in Treasury's treatment of respective Japanese manufacturing home market costs.

Throughout the course of the administrative proceeding, the five Japanese manufacturers made repeated and detailed submissions of data to the Treasury's Bureau of Customs, explaining the marketing system

for television sets in Japan and the specific costs they incur in that market which are not incurred in sales to the United States. The documentation containing these data (which Petitioner has not been permitted to examine) reportedly amounts to several tons.

In November of 1969, after reviewing these materials in detail, the Bureau's staff concluded that dumping margins were nonexistent or minor. It therefore indicated its intent to recommend that the case be closed on the basis of voluntary assurances of no future LTFV sales. At the Bureau's suggestion, the five Japanese companies submitted such assurances in December of 1969.

For reasons unknown to Petitioner, the Bureau shortly thereafter undertook a complete re-analysis of the proceeding and made substantial changes in the treatment of the expenses previously allowed as deductions in computing the adjusted home market price. Although based on essentially the same evidence and supposedly computed in accordance with the same statutory criteria, the new calculations produced sizable apparent dumping margins, since the Bureau refused to allow many of the expenses it had previously deducted in calculating the adjusted home market price. All such changes were made without an opportunity for affected parties to be heard, to cross-examine witnesses or to rebut the evidence relied on by the Bureau, nor was any record permitted which could provide a basis for subsequent review of the Bureau's and Treasury's action.

Neither Petitioner nor the Japanese manufacturers were able to obtain adequate explanations for the disallowances or for the sudden reversal of the Bureau's

position. In some instances, Petitioner was told that Treasury's legal counsel believed the expenses "inappropriate" for allowance; that they were "not understood"; that they seemed "too large" (although the Bureau did not appear to challenge their veracity); that they seemed "duplicative"; or that they did not appear to be "properly allocated" to television sales. Additional disallowances were made with little or no explanation. Each of the disallowances increased the apparent dumping margins as found by the Bureau.

On May 27, 1970, concurrently both with the sudden reversal of position regarding cost allowances and with heightened tension in trade relations between the United States and Japan, the Treasury Department published in the Federal Register a change in its policy regarding the acceptance of price assurances for the purpose of terminating antidumping cases.* As a result of this reversal of policy, the Customs Bureau advised the five Japanese manufacturers that, contrary to the Bureau's previous position, price assurances would not provide a satisfactory basis for terminating the television antidumping case. The sudden reversals of the Bureau's position with respect to allowances and disallowances, the existence of actual or potential dumping margins and the refusal to accept price assurances was made possible in this proceeding because at no time did Treasury feel that it would be required to conduct a hearing on the record where it would

* The revised policy, which was applied not only to future cases but also to the pending television case, stated that [voluntary] "price assurances [as a method of settling cases] are now being accepted only in cases where dumping margins are minimal in terms of the volume of sales involved" irrespective of whether the dumping margins themselves are minimal].

be required to disclose the reasons for its decisions, which record could then be subject to judicial review and scrutiny.

On August 28, 1970, Treasury held a press conference at which it announced its decision to withhold appraisement on television sets from Japan. This was the only such press conference in the 50-year history of the Act. On that occasion, Assistant Secretary Rossides (who is charged with making Treasury's LTFV determination on behalf of the Secretary) made remarks creating the strong impression that he had prejudged the issues.* These statements were made while the case was pending before him, and despite his express recognition that in enforcing the Antidumping Act the Treasury Department "acts in a quasi-judicial capacity." During the pendency of the proceeding, Mr. Rossides also stated that he would henceforth exercise all discretion available to him under the Antidumping Act for the benefit of domestic manufacturers.

The Withholding of Appraisement Notice published in the *Federal Register* on September 4, 1970 (Appendix F) contained a totally uninformative "statement of reasons" concerning the apparent dumping margins and the basis of the withholding order. Much

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* "[A] number of consumers in Japan were a little bit incensed that they were paying a higher price in Japan than the American consumer here—they can either lower the price in Japan, which would benefit the Japanese consumer, or raise their price to the U.S. so that the two prices are equivalent." (Transcript of Press Conference on Withholding of Appraisement on Television Receiving Sets from Japan, at 13)

"What we will do is we will withhold appraisement; then they will be required immediately to adjust their prices. This is going to happen, no matter what." (Id. at 18).

of the notice was copied almost verbatim from withholding notices routinely issued in antidumping cases. It did not explain the data on which Treasury relied, the criteria it employed in making its decision, or the probable extent of any dumping margins; the pro forma LTFV determination published in the *Federal Register* on December 5, 1970 (Appendix G) was equally uninformative. At no time before or since has Treasury provided Petitioner with such information. The unlimited opportunity for improper use of the Antidumping Act to deny fundamental constitutional rights is clear.

Petitioner is a major importer of television sets from Japan, marketing and distributing those sets under its private brand name. As such, Petitioner is obligated to pay any dumping duties which may be assessed by the Customs Bureau, as well as any higher prices for merchandise which may result from the LTFV determination. Yet Petitioner cannot ascertain the facts or criteria which Treasury will apply to determine whether dumping exists with respect to television sets imported since September 1970 and possibly during a period of many years thereafter. Lack of such knowledge severely hampers Petitioner's ability to negotiate the lowest possible prices from its Japanese suppliers for the ultimate benefit of U.S. consumers. Lack of knowledge also means that Petitioner cannot determine the cost of such television sets at the time it must offer them for retail sale.

By letters dated September 17 and 18, 1970, Petitioner and other parties to the proceeding requested the Commissioner of Customs to hold a hearing on the record in accordance with due process of law under the Constitution and the adjudicatory provisions of the

Administrative Procedure Act. They requested that such a hearing be held prior to the LTFV determination. They also presented a specific list of procedural requests designed to obtain sufficient information to make such a hearing meaningful. (See Petitioner's Appendix in the Court of Appeals below, pp. A5-A9).

On October 6, 1970, Matthew J. Marks, the Deputy to Assistant Secretary Rossides, wrote to the parties expressly denying all of the fundamental procedural rights they sought.* At a subsequent "conference" held by Treasury on October 14, 1970 for the purpose of permitting an opportunity for interested persons to appear and present views (see 19 C.F.R. § 153.37), Mr. Marks continued to deny these rights. He refused to permit any interrogation by the parties either of each

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* Mr. Mark's letter:

(a) rejected the parties' request for a hearing with respect to a determination of any sales at less than fair value in accordance with due process of law under the Constitution and the adjudicatory provisions of the Administrative Procedure Act;

(b) rejected the applicability of the adjudicatory safeguards of the Administrative Procedure Act in antidumping proceedings;

(c) rejected the parties' request that a record be kept of the "conference" to be held by Treasury on October 14, and directed the parties not to attempt to keep any such record themselves;

(d) refused to provide the parties with any explanation of the specific basis for ordering the withholding of appraisement on Japanese television sets, or any explanation of the specific evidence relied upon by Treasury in issuing such an order;

(e) rejected the parties' request for information and materials necessary to prepare their defense in further proceedings before Treasury.

other or of Treasury and Customs personnel. He also refused to allow a record of the proceedings to be kept. Despite the absence of a record, Mr. Rossides, the Treasury official responsible for deciding the television antidumping case, did not attend the "conference."

As a result of Treasury's conduct, it became clear to Petitioner that there were no further administrative steps it could take to ensure its fundamental procedural rights under the Constitution and the Administrative Procedure Act. Petitioner therefore sought relief in the Federal District Court in order to protect itself against the deprivation of such rights and to ensure that a fair and impartial administrative adjudication would be available under the Antidumping Act.

C. The Judicial Proceedings Below

On November 13, 1970, Petitioner filed a complaint in the Federal District Court for the Southern District of New York to compel Treasury to afford it the procedural rights to which it believes it is entitled.* By order to show cause, filed under local court rules, a hearing for preliminary injunction, was held in the District Court on November 27, 1970. No responsive pleadings were filed by Treasury. In its Brief, however, Treasury suggested, pursuant to Rule 12(h)(3), F.R.C.P., that the District Court was without jurisdiction over the subject matter of the action. The District Court took the case under advisement and on

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* Jurisdiction was alleged under 28 U.S.C. §§ 1331, 1340, 1361, 1651, 2201-2202; the Administrative Procedure Act of June 11, 1946, 60 Stat. 243 (1946), 5 U.S.C. §§ 702-706; the Due Process Clause of the Constitution and the District Court's general equity jurisdiction. The American Importers Association supported Petitioner's position as *amicus curiae*.

December 3, 1970, rendered findings of fact and conclusions of law, the last sentence of which was an order dismissing Petitioner's action for lack of jurisdiction over the subject matter.

On December 4, 1970, Petitioner noticed its appeal to the Court of Appeals for the Second Circuit and immediately applied to that Court for an injunction pending appeal (which was denied), and an expedited appeal (which was granted). Oral argument was held in the Court of Appeals on January 6, 1971. On March 1, 1971, the Court affirmed the District Court's dismissal for lack of jurisdiction over the subject matter, stating that Petitioner "must seek its relief against the Government in the Customs Court." The Court specifically noted that it was not reaching "the question of whether or not the procedures employed by the Treasury Department violate the Due Process Clause of the Fifth Amendment." It was merely deciding the question of "whether this constitutional issue is to be determined initially by the District Court or the Customs Court." The Court based its affirmance on the belief that Congress had provided a "complete system of corrective justice with respect to matters arising under the customs laws"; that the jurisdiction of the Customs Court must be exclusive to be effective; that the instant litigation arose under the customs laws; and that, therefore, the Federal District Courts should not intervene in the matter.

REASONS FOR GRANTING THE WRIT

I.

Petitioner challenges the constitutionality of procedures employed by Treasury in conducting its administrative adjudicative proceeding under the Anti-

dumping Act, as well as Treasury's apparent prejudgment of the issues in the television antidumping case. It is Petitioner's position that the District Court has jurisdiction to prevent irreparable injury resulting from the deprivation of its fundamental procedural rights. This is the sole issue raised by the present litigation.

Contrary to long-standing precedent in analogous situations, the Court of Appeals affirmed the District Court's finding that it lacked subject matter jurisdiction, on the grounds that (1) 28 U.S.C. §§ 1340 and 1582(a) compel the conclusion that exclusive jurisdiction resides in the Customs Court and (2) the exercise of the District Court's equity jurisdiction at this time would contravene 26 U.S.C. § 7421, Internal Revenue Code of 1954, which prohibits a suit "for the purpose of restraining the assessment or collection of any tax."

Section 1340, the first and principal ground for the decision, ousts the Federal District Court of jurisdiction over matters "within the jurisdiction of the Customs Court." As noted below, the Customs Court had no jurisdiction over Petitioner's claim at the time this action was brought. That Court has also repeatedly stated that it lacks power to grant injunctive or other equitable relief at any time. Furthermore, a substantial risk always exists that the changing market conditions may deprive importers in antidumping cases of the opportunity ever to invoke Customs Court jurisdiction, although the injuries suffered as a consequence of adverse LTFV determinations often continue.

Under these circumstances, the Court of Appeals has extended the scope of Section 1340 beyond the rea-

sonable construction of the statutory language or the legislative intent. It has also deprived District Courts of an important aspect of their traditional equity jurisdiction—the right to consider complaints for declaratory and injunctive relief in exceptional cases involving a deprivation of fundamental rights in federal administrative adjudicative proceedings.

The decision below is a substantial departure from accepted principles of Federal jurisdiction and is in conflict with the application of those principles both by this Court and by other Circuits in analogous situations. In effect, it denies the opportunity for relief against fundamental deprivations merely because a question involving the importation of foreign merchandise may ultimately be involved, although such relief is available where the administrative adjudication involves a purely domestic transaction. Such a distinction warrants review by this Court.

A. Traditional Jurisdiction of the District Court

Until the decisions below, it has always been considered a well-established principle that the District Court has jurisdiction over complaints for injunctive and declaratory relief raising issues of procedural due process. Indeed, Petitioner's complaint is founded on six separate statutory grounds conferring jurisdiction on the District Court or authorizing it to grant the requested relief.* The complaint is also based on

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* The statutory grounds can be summarized as follows:

(a) Because Petitioner's claim is founded on the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, it arises under "the Constitution, laws, or treaties of the United States" as provided in 28 U.S.C. § 1331(a). The injury caused Petitioner

the District Court's general equity powers. No technical issue under the customs law is involved in Petitioner's complaint.

The principle is well-established that, even if there exists an express statutory provision for exclusive review of an administrative decision in another court or at another time, the District Courts have jurisdiction under 28 U.S.C. § 1331 and otherwise to intervene in an administrative proceeding to correct fundamental procedural improprieties causing irreparable

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by Treasury's denial of its procedural rights far exceeds the $10,000 statutory amount.

(b) Petitioner asserts that it is "suffering legal wrong because of agency action" within the meaning of the Administrative Procedure Act, U.S.C. §§ 702-706. That statute therefore entitles Petitioner to judicial relief of its claim. 5 U.S.C. § 702.

(c) Because Petitioner asserts that Due Process and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, require Treasury to afford it the fundamental procedural rights it seeks in a proceeding brought under the Antidumping Act, it arises under an Act of Congress "providing for revenue from imports." The District Court therefore has jurisdiction under 28 U.S.C. § 1340.

(d) Pursuant to the All Writs Act, 28 U.S.C. § 1651, the federal courts may issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The District Court can thus grant the injunctive relief Petitioner seeks.

(e) Petitioner's claim presents "a case of actual controversy" before a "court of the United States." Hence the District Court has power to grant Petitioner declaratory relief. 28 U.S.C. §§ 2201-2202.

(f) Since Petitioner seeks a mandatory order requiring Treasury to hold a proper hearing before rendering its LTFV determination, the District Court has jurisdiction under the mandamus statute. 28 U.S.C. § 1361.

injury.* One of the clearest applications of this principle is found in the decision of the Court of Appeals for the District of Columbia in *Amos Treat & Co.* v. *SEC,* 306 F.2d 260 (D.C. Cir. 1962). In that case, plaintiff sought to disqualify the Chairman of the SEC from participating in a hearing looking to the possible revocation of its broker-dealer registration on the ground that he had previously participated in the hearing. The District Court refused to enjoin the hearing on the grounds (1) that plaintiff had not exhausted its administrative remedies since a final order had not been entered in the administrative proceeding and (2) that the statutory scheme adopted by Congress expressly provided that the Court of Appeals had exclusive jurisdiction to review the Commission's action. 15 U.S.C. § 78y. The Court of Appeals reversed, noting that "[w]e are confronted by a situation where the asserted infirmity is fundamental." 306 F.2d at 265. It held that the District Court had immediate jurisdiction of plaintiff's claim. Most importantly, the Court of Appeals clearly stated that the District Court's jurisdiction existed not by way of review of the Commission's orders, but "solely on due process grounds." 306 F.2d at 267.

This principle of District Court jurisdiction is not new. It dates back at least as far as *Skinner & Eddy*

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* Petitioner's complaint obviously involves a claim of fundamental procedural irregularities in the Treasury proceeding. Since the dismissal below was based solely on jurisdictional grounds, neither the District Court nor the Court of Appeals reached the merits of Petitioner's statutory and constitutional claim to a hearing before the LTFV determination is made. For the purpose of this appeal, the validity of that claim must therefore be presumed.

Corp. v. *United States,* 249 U.S. 557 (1919), where this Court held that because plaintiff alleged that the Interstate Commerce Commission had exceeded its powers, the statutory review procedure (requiring relief to be sought first from the Commission) need not be followed and that the District Court had jurisdiction to intervene immediately.

Skinner & Eddy has been followed in many cases, including most recently in *Jewel Companies, Inc.* v. *FTC,* 432 F.2d 1155, 1159 (7th Cir. 1970). Plaintiff there contended that an FTC Commissioner had misconstrued his statutory obligation by assuming that he had no discretion to consider whether the issuance of a complaint was in the public interest. The FTC sought dismissal of the suit on the ground that the District Court lacked jurisdiction to intervene in the pending agency action. The Seventh Circuit held that "[s]ince the question is one of statutory construction as to the authority of a Commissioner in voting for the issuance of a complaint for violation of Robinson-Patman and does not involve any substantive determination by the Commission" the District Court properly had jurisdiction to decide the question immediately, rather than awaiting federal review of a final FTC order in the Court of Appeals.

This Court has consistently recognized the District Courts' power to intervene to correct fundamental errors during administrative proceedings *despite* the existence of a statutory scheme setting forth a method of review which ordinarily would preclude such intervention. See, *e.g., Leedom* v. *Kyne,* 358 U.S. 184 (1958) holding that—despite the fact that NLRB certification orders are restricted under the statutory scheme to

review in the Courts of Appeals in circumstances not present in that case—the District Court nonetheless had jurisdiction under 28 U.S.C. § 1337 to decide plaintiff's claimed deprivation of an essential right. To the same effect is *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), holding that despite the statutory availability of immediate review by the Court of Appeals in certain instances and the absence of any such provision for review in the District Court, the latter Court nonetheless has jurisdiction to enjoin enforcement of a regulation which plaintiff claimed was issued in excess of the FDA's authority. See also *Elmo Division of Drive-X* v. *Dixon,* 348 F.2d 342 (D.C. Cir. 1965); *Deering Milliken, Inc.* v. *Johnston,* 295 F.2d 856 (4th Cir. 1961); *Wanderer* v. *Kaplan,* 1962 CCH Trade Ca. ¶ 70,535 (D.D.C. 1962); *Archer* v. *Lemke,* 1962 CCH Trade Ca. ¶ 70,417 (N.D. Ill. 1962) (all authorizing immediate intervention and judicial relief against federal agency proceedings).

Similarly, the mandamus cases under 28 U.S.C. § 1361 stand for the same principle. See, *e.g., Knoll Associates, Inc.* v. *Dixon,* 232 F. Supp. 283, 285 (S.D.N.Y. 1964), where the District Court, when asked to intervene in a pending FTC proceeding, stated:

> "Certainly it is clear that if, in the course of the proceedings before the Hearing Examiner, any of plaintiff's constitutional rights were disregarded, or if a substantial unfairness were accorded plaintiff there so that a fair and impartial hearing was denied it, or the proceedings were tantamount to an unwarranted trespass upon its rights, this Court should not hesitate to step in. Under 28 U.S.C. § 1361 the Court has jurisdiction to compel the performance of a duty, and this goes far beyond

ministerial duties, for fundamental trial rights are not immaterial." *

In short, the foregoing cases leave no doubt that the Court below has contravened established precedents regarding Federal District Court jurisdiction where fundamental constitutional safeguards are involved. The precedents clearly apply where, as here, the statutory scheme of review is inadequate because the Customs Court cannot hear Petitioner's claim until a later time, if ever, and cannot grant adequate relief. Moreover, the failure to order the Secretary of the Treasury to hold a due process hearing before rendering his LTFV decision leaves Petitioner with no record on the basis of which to seek meaningful judicial review of the substantive decision made in the administrative proceeding. If the decision is not reversed, it will bar aggrieved parties from access to the District Court in situations

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* The reasoning closely parallels that of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 47 (1938) in which this Court held that the District Court did not have jurisdiction to enjoin an NLRB hearing in a pending proceeding where there was "no claim by the corporation [plaintiff] that the statutory provisions and the rules of procedure prescribed by such hearings are illegal." By implication, both *Myers* and *Knoll Associates* would have required immediate jurisdiction if fundamental procedural rights had been at stake.

Even with respect to the selective service laws, where Congress took direct action to narrow drastically the availability of pre-induction judicial review, the federal courts have consistently been prepared to intervene prior to induction in cases where the plaintiff has been denied a right to which he is entitled. See, *e.g.*, *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968). Also see *Carey* v. *Local Board No. 2, Hartford, Connecticut*, 297 F. Supp. 252 (D. Conn. 1969), *aff'd*, 412 F.2d 71 (2nd Cir. 1969), granting mandamus under 28 U.S.C. § 1361, and *Breen* v. *Selective Service Board*, 396 U.S. 460 (1970).

where the courts are urgently needed to prevent irreparable harm resulting from a deprivation of fundamental constitutional rights and to preserve public confidence in the administrative process.*

Above all, the Second Circuit's decision flatly contravenes the view of other Circuits—and by implication the holdings of this Court—that there are circumstances under which the District Courts can intervene in antidumping or customs law proceedings. See especially *Cottman Co.* v. *Dailey,* 94 F.2d 85, 89 (4th Cir. 1938):

> "We do not mean to say that cases may not arise where a District Court may properly enjoin acts by the Secretary of the Treasury or his assistants, when they are threatening action beyond the scope of their authority which because of extraor-

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* The fact that Treasury's action will cause Petitioner considerable economic injury is, in itself, a distinct ground of equity jurisdiction. If Treasury's LTFV determination stands, Petitioner may be subject to up to $1,000,000 or more in dumping duties per year for many years or to comparable increases in the prices it is charged by its Japanese suppliers. As the District of Columbia Court of Appeals recently held in *IBDTA* v. *SEC,* No. 22,553 (March 4, 1971), the presence of otherwise irremediable economic injury is enough in itself to give the District Court jurisdiction over plaintiff's claim that improper administrative action has caused him harm even where a statute provides for an "exclusive" avenue of review of that action in another forum:

> "The elimination of give-ups which confront apellants with pecuniary harm was accomplished, not merely threatened. There was no means within the administrative framework by which appellants could force the Commission to hold further hearings on give-ups. As to them, the Commission's action was effective and final. That resulting economic harm to appellants means that they are aggrieved and appellants have no remedy through further administrative action for undoing the harm that has been done. It is these practicalities that establish the jurisdiction of the District Court."

dinary and exceptional circumstances may result in irreparable injury to a complainant. . . . "

See also *Horton* v. *Humphrey,* 146 F.Supp. 819, 821 (D.D.C. 1956), *aff'd per curiam,* 352 U.S. 921 (1956); *Argosy Limited* v. *Hennigan,* 404 F.2d 14, 21 (5th Cir. 1968).

The extraordinary and exceptional circumstances contemplated by the Court in the *Cottman* case are present in this proceeding. In the first place this is the first case challenging the procedures under the Antidumping Act where the importer, if he seeks access to the Customs Court, would have to pay the contested special dumping duties as condition precedent to invoking the jurisdiction of the Customs Court. 28 U.S.C. § 1582(c).

Secondly, this is the first case arising under the Antidumping Act of which involves a mass merchandised consumer product. If dumping duties are improperly assessed as the result of the use of procedures by Treasury which deny fundamental constitutional and statutory rights, it is the U.S. consumer who will suffer by any delay in court review, since the imposition of dumping duties, however, improper, will be reflected in higher consumer prices.

Under such circumstances, the present Petition should be granted so that this Court can resolve the conflict created by the decision below. It should also be granted in order to clarify the power of Federal District Courts to intervene in administrative proceedings which involve unusual deprivations of procedural rights having far-reaching significance for the administrative process.

B. Traditional Jurisdiction of the Customs Court

The full significance of denying the District Court's jurisdiction over this matter cannot be fully understood without reviewing the Customs Court's practices and procedures. Even a cursory analysis of Customs Court cases reveals a fundamental difference between that Court and a Federal District Court: the Customs Court has traditionally taken the view that it lacks equity jurisdiction. In *Commins-Collins* v. *United States*, 20 Cust. Ct. 93, 97, C.D. 1090, *aff'd*, 36 CCPA 88, C.A.D. 403, for example, the Customs Court held:

> "If the only question involved were equitable relief for the plaintiff, and if this court had jurisdiction over same, the contentions of the plaintiff might be tenable. But it has long been held, however, that this court is a court of the United States of limited and special jurisdiction and without equitable jurisdiction."

In numerous cases the Customs Court has expressly held that relief is impossible because the remedy plaintiff seeks is equitable in nature and hence beyond the Court's power.* This alleged lack of equity jurisdiction deprives persons aggrieved in administrative proceedings under the Antidumping Act of any opportunity for obtaining effective relief in the Customs Court under the circumstances of this case.

Moreover, the deficiencies in ultimate Customs Court review further reduce the prospects of obtaining meaningful relief. The absence of any record of Treasury's decision or indication of the basis therefor, other than

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* See, *e.g.*, *Carl Matusek Shipping Co., Inc., Distributors Associates Inc.* v. *United States*, 51 Cust. Ct. 12; *Harry A. Liebler* v. *United States*, Abstract 20022.

the pro forma LTFV determination published in the *Federal Register,* deprives the Customs Court of the "administrative record" or the "whole record" on which review of agency action must be based. 5 U.S.C. § 706. This lack of a record, together with the fact that there is a presumption in favor of the correctness of the administrative determination below, make it absolutely clear that there is no trial de novo in the Customs Court, but rather an unusual kind of appellate review without a record of the proceedings below. As a result, neither an importer challenging a dumping duty nor the Customs Court itself has an adequate basis on which to review the LTFV decision. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 39 U.S.L.W. 4287, 4292-93 (Sup. Ct. 1971); *Burlington Truck Lines* v. *United States,* 371 U.S. 156 (1962). In this situation it is not surprising that no LTFV determination has ever been reversed on judicial review.

The Customs Courts Act of 1970, Public Law 91-271, makes even more inadequate the remedy available to Petitioner in that Court. Whereas an importer formerly could file an appeal and seek review of the assessment of special dumping duties without paying such duties, this procedure no longer exists. 28 U.S.C. § 1582(c), as now amended, states that "The Customs Court shall not have jurisdiction of an action unless all liquidated duties, charges or exactions have been paid at the time the action is filed." Unlike a taxpayer in a case arising under the Internal Revenue Code, the importer must now pay what the government claims he owes before he can contest the claim. Even if he prevails on review, he receives no interest on the disputed money Treasury has wrongfully held during the years while the review was pending. Where—as here—

the amount in dispute may well exceed a million dollars annually for a decade or more, the inadequacy of Customs Court review becomes even more apparent.*

The so-called Customs Court "remedy" may also frequently turn out to be nonexistent for importers in antidumping cases. If, for example, Treasury's LTFV determination causes an importer's Japanese suppliers to raise their prices to that importer sufficiently to avoid the apparent dumping margin, that importer may never have a remedy in the Customs Court for the injury caused by Treasury's action. The protest mechanism would then become totally unavailable to obtain that Court's review, because the duty levied at the time of entry would include no dumping duty. The Customs Court would consider the issue moot. See *Southwestern Sugar & Molasses Co., Inc.* v. *United States,* 21 Cust. Ct. 8, C.D. 1117 (1948), and cases there cited; also *Shell Oil Company, Inc.* v. *United States,* 54 Cust. Ct. 64, C.D. 2509 (1965).

Yet the injury to such an importer would nonetheless be very real. It would, for example, be required

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* Inadequacy of a remedy upon ultimate judicial review of agency action is a proper ground for the District Court to exercise its equitable jurisdiction. As was said in *Silver King Mines, Inc.* v. *Cohen,* 261 F. Supp. 666 (D. Utah 1966), where the District Court took jurisdiction under 28 U.S.C. §§ 1331 and 1337 in order to intervene in an SEC proceeding:

> "The granting of an injunction to prevent arbitrary action of an administrative agency in violation of the due process provisions of the United States Constitution and infringing upon the rights, privileges and immunities secured by the Constitution, when there is no adequate and complete remedy otherwise, is authorized by the inherent equity jurisdiction conferred upon United States District Courts by the Constitution." 261 F. Supp., at 674.

Also see *Deering Milliken, Inc.* v. *Johnston,* 295 F. 2d 856, 864 (4th Cir. 1961) and *Jewel Companies, Inc.* v. *FTC;* 1970 CCH Trade Reg. Rep. ¶ 73,315 (7th Cir. 1970).

to pay higher prices directly resulting from the LTFV determination. But since the importer could not protest that determination, it could never alleviate this economic harm. Nor would the deprivation of fundamental procedural rights in connection with such an antidumping proceeding be reviewable in the Customs Court at any time. And an importer could never relieve the damage to its public image as a purchaser and retailer of dumped goods.

Furthermore, the Congressional intent and the policy considerations underlying the Antidumping Act do not support the grant to the Customs Court of exclusive jurisdiction over an issue of procedural due process such as Petitioner raises in this case. There are two major reasons for requiring cases involving a specific subject matter to be heard exclusively by a forum other than the District Court. One is that the other forum possesses a specialized expertise, not available to the District Court, which is necessary to decide the issue. 28 U.S.C. § 1340 recognizes that the Customs Court has such expertise for technical questions involving appraisement and classification of an import. As Petitioner does not raise such an issue, however, the expertise of the Customs Court is not relevant. On the contrary, Petitioner's claim is for procedural due process—a matter in which the District Courts have traditional expertise.

The second reason for requiring exclusive jurisdiction is to prevent two courts from having concurrent jurisdiction over the same matter. As Petitioner could not have invoked the jurisdiction of the Customs Court when it initiated this action, there was no possibility of that Court exercising jurisdiction concurrently with the District Court. By invoking exclusive Customs Court jurisdiction, the Court below did not avoid concurrent jurisdiction; it denied Petitioner an effec-

tive remedy altogether. Petitioner does not believe that Congress intended this result in establishing the jurisdiction of the Customs Court.*

* Neither was this result dictated by the cases on which the Court of Appeals relied. In each such case, there was final customs decision from which the plaintiff could have immediately filed a protest or its equivalent and obtained prompt review of the decision in the Customs Court. By contrast, Petitioner has no present remedy. Moreover, in each instance the plaintiff challenged a substantive determination rather than the denial of a procedural right. The technical expertise of the Customs Court was thus relevant to his claim. These are precisely the circumstances to which that court's statutory jurisdiction was specifically intended to apply. Before the decision below, no court had ever held that the Federal District Court lacks jurisdiction to hear a claim for procedural due process raised at this juncture in an antidumping proceeding, merely because the Customs Court would at a later time have jurisdiction to review the correctness of the ultimate customs duty.

The cases relied on by the Court of Appeals are distinguishable on additional grounds. In *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (4th Cir. 1938), the identical issue had already been subject to extensive litigation in the Customs Court; the plaintiff merely sought to relitigate the same question in the District Court. In *Argosy Limited* v. *Hennigan*, 404 F. 2d 14 (5th Cir. 1968), District Court jurisdiction would have divided a single technical customs issue between two courts. In *Cresthill Industries, Inc.* v. *Fowler*, 66 Civ. 1958 (S.D.N.Y. 1966); *Morgantown Glassware Guild* v. *Humphrey*, 236 F. 2d 670 (D.C. Cir. 1956), *cert. den.*, 364 U.S. 891 (1964), and *Eastern States Petroleum Corporation* v. *Rogers*, 280 F. 2d 611 (D.C. Cir. 1960), *cert. den.* 364 U.S. 891 (1964), the action of which plaintiff complained (tariff-making pursuant to Congressional delegation) was plainly legislative rather than adjudicative in nature.

There is a further and equally important distinction between the present litigation and the cases on which the Court of Appeals relied. All of those cases were decided prior to the enactment of the Customs Courts Act of 1970, Public Law 91-271. As noted above, that statute requires an importer challenging a dumping duty to pay the disputed duty before he can obtain review in the Customs Court. This prepayment was not required to challenge

C. The Tax Injunction Issue

In the concluding paragraph of its opinion, the Court of Appeals states that "to permit this action in the District Court at this time would contravene 26 U.S.C. §7421, Internal Revenue Code of 1954, which prohibits a suit 'for the purpose of restraining the assessment or collection of any tax'." The decision below is patently erroneous, since petitioner's action sought only protection of fundamental constitutional rights, not an injunction against imposition of a tax or duty.

The only conceivable basis for the suggestion that Section 7421 might apply to customs duties appears in a footnote to the District Court's opinion in *Horton* v. *Humphrey,* 146 F. Supp. 818, 821 n. 5 (D.D.C. 1956), *aff'd per curiam,* 352 U.S. 921 (1956), wherein it was stated that "This section [26 U.S.C. § 7421] is applicable to tariff matters." The footnote was unnecessary to the decision in *Horton.* No court has yet undertaken a thorough analysis of whether the policies and purposes behind section 7421 are appropriately served by applying it to customs duties or whether—as Peti-

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dumping duties at the time of any of the decisions cited by the Court of Appeals. Thus the rationale on which *Horton* v. *Humphrey,* 146 F. Supp. 819 (D.D.C.), *aff'd per curiam,* 352 U.S. 921 (1956) largely relied is no longer relevant.

> "The fact that an importer does not need to pay a challenged duty until this method of review has been exhausted goes far to sustain the decisions just cited [cases holding that the Customs Court has exclusive jurisdiction]." 146 F. Supp. at 820.

The payment of duty after adjudication was a vital basis for the previous exclusive jurisdiction cases. Even if those cases applied to this proceeding, which they do not, they would no longer have validity. Compare *Hager* v. *Reclamation District No. 108,* 111 U.S. 701 (1884); *Nickey* v. *Mississippi,* 292 U.S. 393 (1934).

tioner contends—such application denies fundamental constitutional rights.

In Petitioner's view, Section 7421 was never intended to apply to customs duties, and such an interpretation makes no sense as a matter of policy. Tariff matters are not taxes under Title 26, the home of Section 7421. Hence, they are not taxes within the meaning of that statute. Further, parties to a tariff proceeding lack the judicial review available to taxpayers on whom taxes are levied under the Internal Revenue Code. Taxpayers have two advantages not present here: first, disputed taxes do not have to be paid as a prerequisite to suit in the Tax Court; and second, the latter review—unlike review in the Customs Court—permits a trial *de novo*.

Even if customs duties were considered to be a taxes for purposes of Section 7421, the mandamus order to hold a hearing which Petitioner seeks cannot under any reasonable interpretation be construed to restrain the "assessment or collection of any tax." No tax has yet been assessed or levied.* An injunction to order a taxing authority to grant a potential taxpayer procedural due process is not a restraint of the tax itself.

CONCLUSION

This petition presents a significant question as to the power of the Federal District Courts to intervene in an administrative adjudicative proceeding in order

* Furthermore, even if the customs duty were considered to be a tax for purposes of section 7421 and this proceeding an action to restrain the "assessment or collection of any tax" within the meaning of section 7421, section 7421 should not apply. In *Hill* v. *Wallace*, 259 U.S. 44, 62 (1921), this Court ruled that a predecessor statute to section 7421 did not prevent an injunction in a case in which extraordinary and exceptional circumstances make its provisions inapplicable.

to protect fundamental constitutional rights where the issue arises under the Antidumping Act of 1921. The question has never before been considered by this Court. The decision below is contrary to established legal precedents regarding Federal Court jurisdiction in analogous administrative proceedings under other statutes. It is also contrary to the principles recognized by other Circuits, and implicitly by this Court, in antidumping and customs law proceedings themselves. It effectively precludes judicial control over Treasury's actions. Petitioner thereby suffers irreparable injury resulting from an arbitrary administrative proceeding which denies fundamental constitutional rights. This Court should therefore grant the writ herein requested.

Respectfully submitted,

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May, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 625—September Term, 1970

(Argued January 6, 1971 Decided March 1, 1971)

Docket No. 35682

J. C. PENNEY COMPANY, INC., *Plaintiff-Appellant,*

v.

THE UNITED STATES TREASURY DEPARTMENT, THE BUREAU OF CUSTOMS, DAVID M. KENNEDY, SECRETARY OF THE TREASURY, EUGENE T. ROSSIDES, ASSISTANT SECRETARY OF THE TREASURY, MATTHEW J. MARKS, DEPUTY TO THE ASSISTANT SECRETARY OF THE TREASURY, and MYLES AMBROSE, COMMISSIONER OF CUSTOMS, individually and as officers and/or employees of the United States Treasury Department, or Bureau of Customs,

Defendants-Appellees.

Before: LUMBARD, *Chief Judge,* MOORE and SMITH, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* dismissing action by importer of foreign-made T.V. sets seeking injunctive and declaratory relief against proceeding under Antidumping Act, 19 U.S.C. § 160 *et seq.* Affirmed.

CRAIG MATHEWS, New York, N.Y. (Albert W. Driver, Jr., New York, N.Y., Charles T. Stewart, Archibald E. King, of counsel),

LEVA, HAWES, SYMINGTON, MARTIN & OPPENHEIMER, Washington, D. C., of counsel,

for Plaintiff-Appellant.

ANDREW P. VANCE, Chief, Customs Section, U.S. Dept. of Justice, New York, N.Y. (L. Patrick Gray, III, Assistant Attorney General, Civil Division, Dept. of Justice, Washington, D. C., Frederick L. Ikenson, Civil Division, Dept. of Justice, of counsel), *for Defendants-Appellees.*

SAMUEL FRANKEL (American Importers Association, Inc., New York, N.Y.), *on the brief for American Importers Association, Inc. as Amicus Curiae.*

SMITH, *Circuit Judge:*

This is an appeal from a judgment entered in the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* dismissing plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff [hereinafter "Penney"], who is, *inter alia,* an importer of television sets from Japan, sought declaratory and injunctive relief preventing the Treasury Department from conducting an investigation under the Antidumping Act, 19 U.S.C. § 160 *et seq.* into whether or not the imported television sets were being sold for "less than fair value" [hereinafter LTFV].

On December 4, 1970, Penney noticed its appeal to this court from Judge Weinfeld's decision (handed down the previous day) and immediately applied for an injunction pending appeal (which was denied) and for an expedited appeal (which was granted). We find no error and affirm the judgment.

On the same day that Penney noticed its appeal Treasury issued its LTFV determination, noticed in the Federal Register of December 5 (35 Fed. Reg. 18549).

The Antidumping Act is designed to prevent actual or threatened harm to a domestic industry caused by the sale of merchandise in the United States at prices lower than in the country of origin. Cf. Note, "The Antidumping

Act: Problems of Administration and Proposals for Change," 17 STAN. L. REV. 730, 731 (1965). The procedure employed in making this determination, discussed thoroughly by the court below, is basically as follows: The Customs Bureau issues a "Withholding of Appraisement Notice" when the Commissioner of Customs has reason to suspect that imported goods are being sold at prices lower than in the exporter's home market. Within three months the Secretary of the Treasury must render an LTFV decision if he concludes that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value." 19 U.S.C. § 160(a). After the Treasury's decision, the Tariff Commission renders a decision as to whether or not there has been a real or threatened injury to a domestic industry. If it is found that such injury exists, the proceeding is returned to the Treasury Department for the publication of a dumping "finding." This step entails the imposition of a special dumping duty based on the pricing margin the Treasury has previously found. At this point the importer may file a protest with the Bureau of Customs and contest its denial in the Customs Court.

The determination of less than fair value is a complex one, since it must make adjustments for varying levels of trade and differing combinations of merchandise, services and conditions between sales in the United States and sales in the country of origin. 19 U.S.C. § 161. It is Penney's contention that the Japanese television manufacturers provide numerous services for dealers and distributors that are borne by wholesalers and retailers in the United States. Therefore the conditions of sale are different, justifying a higher price in the country of origin. On appeal, Penney is not directly challenging the substantive basis for the LTFV determination made by the Treasury Department. Rather it attacks what it considers the lack of due process in the methods employed by Treasury in making its LTFV determination. According to Penney,

Treasury does not disclose either the facts upon which its determination is based or the criteria it applies in reaching its decision. It is alleged that Treasury regularly receives confidential information from parties having an interest in the outcome of the proceedings and that it relies on this information without disclosure to the parties adversely affected thereby.

We do not reach on this appeal the question of whether or not the procedures employed by the Treasury Department violated the Due Process Clause of the Fifth Amendment. The question for decision is, rather, whether this constitutional issue is to be determined initially by the District Court or the Custom Court. Since this case is claimed to arise under the "Constitution, laws, or treaties of the United States," Penney contends that jurisdiction derives from 28 U.S.C. § 1331(a), general federal question jurisdiction. It is further claimed that more than $10,000 is in controversy, so no problem is presented in regard to the statutory minimum amount in controversy. We agree with the District Court, however, that Penney must seek its relief against the government in the Customs Court.

In 28 U.S.C. § 1582(a), as amended by section 110 of the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274 (June 2, 1970), Congress has provided that the Customs Court shall have "exclusive jurisdiction" of all civil actions challenging an administrative decision, "including the legality of all orders and findings entering into the same," when that decision involves, *inter alia*, the appraised value of merchandise, the classification and rate and amount of duties chargeable, charges or exactions within the jurisdiction of the Secretary of the Treasury, or the exclusion of merchandise from entry delivery under any provision of the customs laws. Also relevant is 28 U.S.C. § 1340, which provides:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress

providing for internal revenue or revenue from imports or tonnage, except matters within the jurisdiction of the Customs Court.

Penney contends that neither provision bars its suit in the District Court, since its claim in no way concerns the substantive issues which require the expertise possessed by members of the Customs Court. It is therefore contended that the policy behind the grant of exclusive jurisdiction is absent in this case and that constitutional issues can and should be tried in the district courts. To be sure, the nature and extent of procedural due process that must be employed in an administrative proceeding is a question with which federal courts of general jurisdiction frequently deal. However, the procedural issues here arise directly from controversies over issues of substantive customs laws. Although it is conceivable that separate courts could deal with the separate procedural and substantive issues involved, such a result would significantly undermine Congress' "complete system of corrective justice with respect to matters arising under the customs laws." *Cottman Co.* v. *Dailey*, 94 F.2d 85, 88 (4 Cir. 1938).

In interpreting legislation such as that involved in this case, "[c]ourts must . . . look to the logic of Congress and the broad national policy which prompted the legislation." *Argosy Ltd.* v. *Hennigan*, 404 F.2d 14, 20 (5 Cir. 1968). The precursor to the Customs Court, the Board of General Appraisers was established by the Customs Administrative Act of 1890, ch. 407, §§ 12-14, 26 Stat. 137. The court itself was created by the Act of May 28, 1926, ch. 411, 44 Stat. 669, and was given all the powers of the Board of General Appraisers. Metzger and Musrey, "Judicial Review of Tariff Commission Actions and Proceedings," 56 CORNELL L. REV. 285 (1971). See generally, Johnson, "The United States Customs Court—Its History, Jurisdiction, and Procedure," 7 OKLAHOMA L. REV. 393 (1954). Even in the early days of its existence, the Customs Court was recognized as having a broad jurisdiction to

deal with matters related to questions of customs law. See Brown, "The United States Customs Court," at 15 (1933).

In 1948, Congress inserted into the United States Code two sections providing for the "exclusive jurisdiction" of the Customs Court. 28 U.S.C. §§ 1582, 1583. The legislative history of these enactments makes plain that the word "exclusive" was inserted on the basis of and in agreement with the decisions in *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F.2d 41 (2d Cir. 1939), and *David L. Moss Co., Inc.* v. *United States*, 103 F.2d 395 (Cust. & Pat. App. 1939), "and cases cited therein." See 28 U.S.C. §§ 1582, 1583, Legislative History: Reviser's Note. These cases made clear their view that not only did the Customs Court have jurisdiction over customs matters, but that if that jurisdiction was to be exercised effectively in accordance with a complete, integral system of customs adjudication, it must be exclusive. In *Moss* for example, the Court of Customs and Patent Appeals concluded that the Customs Court "is the tribunal established by Congress in the provision of a complete system of corrective justice for the administration of the customs laws, and questions involving the validity of official action and the imposition and collection of duties are properly cognizable before it to the exclusion of other courts." 103 F.2d at 397. This court in *Patchogue* expressed the view that the provisions of 28 U.S.C. §§ 307-310, which provided for exclusive appellate jurisdiction in the Court of Customs Appeals over decisions of the Customs Court, manifested an intention on the part of Congress to have litigation regarding customs matters conducted exclusively in the customs courts. 101 F.2d at 43.

The courts in both *Moss* and *Patchogue* cited *Cottman Co.* v. *Dailey*, *supra*, which reached a similar conclusion. Significantly, another case "cited therein" (in both decisions) was *Riccomini* v. *United States*, 69 F.2d 480 (9 Cir. 1934), which specifically held that the Customs Court possessed exclusive jurisdiction over a challenge to

the constitutionality of the law under which the customs duties were exacted.

By giving official legislative status to the reasoning of these decisions, Congress expressed its agreement that proper administration of the customs laws requires a complete, integral smooth-functioning system of customs law justice. Such an end could not be accomplished if customs issues were fractionalized so that the district courts deal with certain questions such as constitutional issues arising out of customs controversies while the Customs Court concerns itself with the remaining customs issues.

Courts have long recognized that the Customs Court has authority to adjudicate issues of a constitutional nature. *Riccomini* v. *United States, supra.* In *Horton* v. *Humphrey,* 146 F. Supp. 819 (D.D.C.), *aff'd,* 352 U.S. 921 (1956), the court rejected plaintiff's argument that the Customs Court cannot review the constitutionality of a law under which the Treasury Department acted, and it was held that the remedy in the Customs Court was exclusive. In *Eastern States Petroleum Corp.* v. *Rogers,* 280 F.2d 611 (D.C. Cir. 1960), appellant attacked the tax rate imposed upon petroleum imports, charging that the increase in the duty from one-fourth to one-half cent per gallon was an unconstitutional exercise of power. Judge Bazels speaking for the court, held that an adequate and exclusive remedy for the alleged unconstitutional action was available to appellant in the Customs Court.

Congress' intention to include the disposition of constitutional issues within its complete framework of customs adjudication was underscored by the recent enactment of section 108 of the Customs Courts Act of 1970, *supra* [28 U.S.C. § 255], which provides:

§ 255. THREE-JUDGE TRIALS

(a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the

> Customs Court shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

The general purpose of the Customs Courts Act of 1970 was to streamline procedures employed in the Customs Court in order to reduce the backlog of cases brought on by their exclusive jurisdiction in regard to customs matters. Three-judge panels were therefore largely eliminated. See 116 Cong. Rec. H 4460, 91st Cong., 2d Sess. (remarks of Mr. Celler; May 18, 1970). Congress made certain, however, by enacting 28 U.S.C. § 255, that through three-judge courts for constitutional questions a broad representation of the court would review issues of a constitutional nature. 1970 U.S. Code Congressional & Administrative News, No. 6, at 1868-69. See also, 116 Cong. Rec. H 4461, 91st Cong., 2d Sess. (remarks of Mr. Poff; May 1970).

By enacting this provision, then, Congress has demonstated its desire to have thorough and complete adjudication of constitutional questions in the customs court. Viewed in light of official Congressional adoption of the "complete system" approach in the 1948 legislation, the enactment of this section compels the conclusion that Congress intended the Customs Court to have exclusive original jurisdiction of constitutional questions arising out of customs litigation. The pattern of adjudication established by Congress provides for appeal from the Customs Court to the Court of Customs and Patent Appeals, with recourse to the Supreme Court through petition for certiorari. *Horton* v. *Humphrey, supra,* 146 F. Supp. at 820. Such a system provides an adequate means of vindicating legal rights [cf. *Kreutz* v. *Durning,* 69 F.2d

802 (2d Cir. 1934)], and there exists no reason for this court to tamper with it.

Penney cites several decisions for the proposition that Customs Court jurisdiction is far from exclusive, but these cases have no applicability to the facts of the case at bar. In *Croton Watch Co.* v. *Laughlin,* 208 F.2d 93 (2d Cir. 1953), this court found that the District Court had jurisdiction of a suit challenging the action of the Collector of Customs excluding the entry of plaintiffs' goods under 15 U.S.C. § 1124, which prohibited the importation of goods that copy or simulate the name or trademark of goods of an American manufacturer. Unlike the Antidumping Act, relevant in this case, that act was held to be not a part of the customs laws. Similarly in *Precise Imports Corp.* v. *Kelly,* 218 F. Supp. 494 (S.D.N.Y. 1963) (Feinberg, *J.*), *aff'd,* 378 F.2d 1014 (2d Cir.), *cert. denied,* 389 U.S. 973 (1967), it was held that jurisdiction existed in the District Court for a suit challenging the Collector's exclusion of imported knives on the ground that they were switchblades within the meaning of 15 U.S.C. §§ 1241 and 1242. The suit was permitted because these provisions made no mention of the Collector of Customs and were held to be essentially parts of a criminal statute, not provisions of the customs laws. 218 F. Supp. at 495, 378 F.2d at 1015-16.

Penney asserts several other arguments, none of which in our opinion has merit. It is contended that since no protest can yet be filed, the Customs Court lacks present jurisdiction over the controversy. See 19 U.S.C. § 1514, as amended by sections 207 and 208 of the Customs Courts Act of 1970, *supra.* We fully agree with the District Court, however, that "[t]he fact that the controversy may not be ripe for review by the Customs Court does not deprive that court of its exclusive jurisdiction and thereby vest this court with jurisdiction." [Footnote omitted].

It is further urged that even acknowledging that generally exclusive jurisdiction over constitutional issues is vested in the Customs Court, there nevertheless exists a recognized judicial exception to this statutory rule when no adequate relief may be obtained in that court. We do not dispute the existence of such an exception. See, e.g., *Waite* v. *Macy*, 246 U.S. 606 (1918). The exception, however, is inapplicable to the case at bar. Penney argues that the exception is relevant in the present situation, since the Customs Court lacks equitable power to require the holding of a hearing. See, e.g., *Cummins-Collins Distillers* v. *United States*, 20 Cust. Ct. 93, 97, C.D. 1090, *aff'd*, 36 CCPA 88, C.A.D. 403 (1948). Thus the only remedy available to Penney is the obtaining of refunds of special dumping duties which may have been improperly assessed and paid. Though it may be true that the ordering of a hearing would be a more desirable form of relief from Penney's point of view than the obtaining of refunds, the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate. We conclude that there is, in fact, an adequate remedy available to Penney in the Customs Court. Cf. *Eastern States Petroleum Corp.* v. *Rogers, supra*, 280 F.2d at 614: "[T]he distinctions between the customs court and the district courts do not rise to a level at which it may be said that final adjudication of constitutional questions in the customs courts offends the requirements of due process."

It is strenuously argued that jurisdiction exists in the District Court on the basis of 28 U.S.C. § 1651, the All Writs Act; 28 U.S.C. §§ 2201-02, the Declaratory Judgment Act; and 28 U.S.C. § 1361, an act providing for mandamus. These sections may not, however, be construed to provide subject matter jurisdiction in the District Court. 28 U.S.C. § 1331(a), general federal question jurisdiction, has been found to be inapplicable for the sole reason that the Customs Court possesses exclusive jurisdiction under 28 U.S.C. § 1582(a). If it were not for the exclusive juris-

diction provisions, section 1331(a) would be a perfectly adequate source of jurisidiction. Jurisdiction in the District Court is denied, not because of a defect in section 1331(a), but because the matter cannot be heard in the District Court, regardless of the asserted source of jurisdiction. The complete system of customs adjudication, as provided for by Congress, would be equally undermined if the District Court were allowed to hear this case under one of the claimed alternative sources of jurisdiction as if it were to hear it under section 1331.

Finally, we agree with the court below that to permit this action in the District Court at this time would contravene 26 U.S.C. § 7421, Internal Revenue Code of 1954, which prohibits a suit "for the purpose of restraining the assessment or collection of any tax." Penney attempts to answer this argument by stating that an order to the Secretary of the Treasury will not restrain the assessment or collection of any tax, since no duty has yet been levied. This proposed distinction between restraint of the authority who is to impose the tax and of the tax itself is illusory. Whether or not the duty has yet been levied, restraining the tax levier at an earlier stage in the proceedings cannot help but have the effect of ultimately delaying the collection of the tax. Where a complete system of review is provided there is no exceptional circumstance to take the case out of the general rule. *Cottman Co.* v. *Dailey, supra.*

The judgment of the District Court is affirmed.

APPENDIX B

J. C. PENNEY COMPANY, INC., *Plaintiff,*

v.

THE UNITED STATES DEPARTMENT OF THE TREASURY, THE BUREAU OF CUSTOMS, DAVID M. KENNEDY, SECRETARY OF THE TREASURY, EUGENE T. ROSSIDES, ASSISTANT SECRETARY OF THE TREASURY, MATTHEW J. MARKS, DEPUTY TO THE ASSISTANT SECRETARY, MYLES J. AMBROSE, COMMISSIONER OF CUSTOMS, individually and as officers and/or employees of the United States Department of the Treasury and/or the Bureau of Customs, Washington, D. C., *Defendants.*

No. 70 Civ. 4980

United States District Court,
S. D. New York.

Dec. 3, 1970.

Charles T. Stewart, Albert W. Driver, Jr., Archibald E. King, New York City, for plaintiff; Leva, Hawes, Symington, Martin & Oppenheimer, Washington, D. C., of counsel.

William D. Ruckelshaus, Asst. Atty. Gen., Andrew P. Vance, Chief, Customs Section, Frederick L. Ikenson, Civil Division, Dept. of Justice, New York City, for defendants.

OPINION

EDWARD WEINFELD, District Judge.

This motion, made on the eve of an administrative determination to be rendered no later than December 4, 1970, by the United States Treasury Department, seeks to enjoin all defendants from making such determination upon the ground of their alleged denial of plaintiff's claim to a due

process hearing before the determination is made. The short span of time between the argument of this motion and the deadline for a decision, as well as the volume of other pressing applications for injunctive relief heard at the same Motion Term, preclude a detailed exposition of the alleged facts set forth in the voluminous papers or of all the legal theories advanced in the extensive briefs submitted by both parties.[1]

The issue now before the court is plaintiff's motion directing the defendants, the United States Treasury Department, Secretary of the Treasury, the Assistant Secretary of the Treasury, the Deputy to the Assistant Secretary, the Bureau of Customs and the Commissioner of Customs, to vacate the withholding of appraisement as to television sets imported by plaintiff from Japan; also, plaintiff seeks a preliminary injunction enjoining the defendants from conducting and completing their current investigation to determine whether such television sets are being sold, or likely to be sold, at less than fair value (hereafter "LTFV"), and from making a determination thereunder; further, plaintiff seeks immediate dismissal of the pending proceeding unless it is accorded a full hearing in accordance with due process of law and the adjudicatory provisions of the Administrative Procedure Act.

The case centers about the Antidumping Law, enacted almost fifty years ago,[2] aimed to prevent actual or threatened injury to a domestic industry resulting from the sale in the United States market of merchandise at prices lower than in the home market (country of origin). The Secretary of the Treasury is charged under the statute

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[1] Although plaintiff's attorneys knew at least as early as October 6, 1970, that their main contentions, the basis of this action, had been rejected by the Treasury Department, suit was not commenced until November 13, and this motion was not brought on for argument until November 24.

[2] 19 U.S.C. § 160 et seq.

with the duty of determining whether "foreign merchandise is being, or is likely to be, sold in the United States * * * at less than its fair value" (LTFV).[3]

In broad outline the procedure with respect to an alleged antidumping violation is as follows. When the Commissioner of Customs has reason to suspect or believe that goods are being imported and sold at less than fair value, and that there is consequent injury, or likelihood of injury, to a United States industry, the Customs Bureau issues a "Withholding of Appraisement Notice."[4] In the normal case, upon the arrival of foreign merchandise in the United States, its processing by Customs includes appraisement to determine what, if any, customs duties are owed on it.[5]

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[3] 19 U.S.C. § 160(a). 19 C.F.R. § 53.3 states:

> "FAIR VALUE BASED ON PRICE IN COUNTRY OF EXPORTATION: THE USUAL TEST.
>
> "(a) *General.* Merchandise imported into the United States will ordinarily be considered to have been sold, or to be likely to be sold, at less than fair value if the purchase price or exporter's sales price (as defined in sections 203 and 204, respectively, of the Antidumping Act, 1921, as amended (19 U.S.C. 162, 163)), as the case may be, is, or is likely to be, less than the price * * * at which such or similar merchandise * * * is sold for consumption in the country of exportation on or about the date of purchase or agreement to purchase of the merchandise imported into the United States if purchase price applies, or on or about the date of exportation thereof if exporter's sales price applies.

[4] The Withholding of Appraisement Notice indicates:

> "(1) That the belief or suspicion relates only to certain shippers or producers, if this is the case and that the investigation is limited to the transactions of such shippers or producers; (2) The expiration date of the notice (which shall be no more than 3 months from the date of publication of the notice in the Federal Register * * *)." 19 C.F.R. § 53.34.

[5] 19 U.S.C. § 1500, as amended by § 204 of the Customs Administrative Act of 1970. Pub. L. No. 91-271, 84 Stat. 274 (June 2, 1970).

Once appraisement has been completed and the merchandise has been entered, no further duty is normally imposed. However, in the instances of withholding of appraisement, the importer, if he desires to receive the merchandise, is required to give a bond in an amount fixed by the Bureau of Customs to secure payment of additional duties should a subsequent finding of dumping be made.[6] Within three months after the Withholding of Appraisement Notice, the Secretary of the Treasury must make his determination as to whether there have been sales at less than fair value.[7] In the event he does make such a determination, he advises the United States Tariff Commission, which, within three months thereafter, determines whether the domestic industry is being, or is likely to be, injured by reason of the importation of such merchandise into the United States. If the Tariff Commission so decides, then the Secretary of the Treasury makes a statutory dumping finding and imposes special dumping duties in an amount sufficient to cover the dumping margin.[8]

There are, however, preliminary steps that precede the withholding of appraisement. If any District Director of Customs has knowledge of any grounds or reason to believe or suspect that any merchandise is being, or likely to be, imported into the United States contrary to the LTFV provisions of the Antidumping Act, he is required to communicate "his belief or suspicion" promptly to the Commissioner of Customs.[9] Also, any person outside the Customs Service who has such information may, on behalf of an industry in the United States, communicate such information in writing to the Commissioner of Customs.[10]

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[6] 19 C.F.R. §§ 53.53, 53.54.

[7] 19 U.S.C. § 160(b); 19 C.F.R. §§ 53.34(b), 53.36.

[8] 19 U.S.C. §§ 160(a), 161; 19 C.F.R. §§ 53.40, 53.56.

[9] 19 C.F.R. § 53.25.

[10] 19 C.F.R. § 53.26.

The nature of the information to be submitted by either the District Director of Customs or an outside complainant is specified in the regulations of the Treasury Department.[11] If the Commissioner of Customs is satisfied, upon the basis of the information submitted, that further investigation is warranted, he publishes an "Antidumping Proceeding Notice," which, among other matters, summarizes the information received, lists the name of the person (if outside the Service) or industry who has presented the question of dumping, and indicates the fact that there is some evidence on record concerning an injury to, or likelihood of injury, or the prevention of establishment of an industry in the United States.[12] Following the publication of the Antidumping Proceeding Notice, the Commissioner conducts a full scale investigation to obtain such additional information as may be necessary to enable the Secretary of the Treasury to make the determination as to the fact or likelihood of sales at less than fair value, which investigation may include inquiries conducted by the Customs representatives in foreign countries.[13] Against this general description of procedure, we turn to the facts in the instant case.

The initial charge of antidumping importation was presented to the defendants in March 1968 by the Imports Committee, Tube Division, Electronic Industries Association. This charge alleged information which indicated "a possibility that monochrome and color television receiving sets from Japan are being, or likely to be, sold at less than fair value within the meaning of the Antidumping Act," and named five Japanese companies as the exporters. Thereafter, on June 18, an "Antidumping Proceeding Notice," dated June 10, was published in the Federal Register, which related to television sets being imported

[11] 19 C.F.R. § 53.27.

[12] 19 C.F.R. § 53.30.

[13] 19 C.F.R. § 53.31.

by plaintiff, among others, and purchased from Japanese exporters, including Matsushita Electric Industrial Company, Ltd. (MEI), plaintiff's principal supplier of monochrome and color television sets. The Notice named the Electronic Industries Association as the source of the information upon which the proceeding was based, and stated that investigation warranted further inquiry to determine the validity of the information.[14]

On June 10, 1968, the Customs Bureau submitted a questionnaire to MEI, and thereafter Customs Agents conducted an extensive investigation in Japan and the United States. Plaintiff alleges that MEI and other Japanese television manufacturers submitted detailed answers to the questionnaire with extensive supporting data, made their records available to the Customs authorities, responded to their inquiries, and from time to time supplied additional data and records. Plaintiff itself conducted a survey of Japanese marketing practices and submitted the results to the Bureau of Customs. The fact issue which now gives rise to plaintiff's dispute as to possible LTFV determination against it, and its claim of right to a hearing to challenge defendants' evidence, centers about the Japanese exporters' contention that the higher price charged in the Japanese market is due to the manufacturers' absorption of advertising, distribution, marketing and other charges not applicable to television sets sold and imported by plaintiff. In sum, plaintiff contends that "the Japanese television manufacturer today provides numerous services for his dealers and distributors that in the United States are borne by wholesalers and retailers",[15] evidently an explanation for the differential not accepted by Customs Agents, who disallowed the claimed price adjustments in the home market, the consequence of which may be to increase the dumping margin, if dumping is found.

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[14] 33 Fed. Reg. 8851 (1968).

[15] Plaintiff's memorandum of law, p. 28.

After the investigation, the Commissioner of Customs caused to be published, on September 4, 1970, a "Withholding of Appraisement Notice,"[16] which set forth his view that there were reasonable grounds to believe or suspect that the Japanese television sets being imported from Japan were priced here at less than the foreign market value, and since that date appraisement has been withheld. The Notice also contained a "statement of reasons" for this view and the criteria upon which it was based, and it invited interested parties to submit their written views or arguments, or to request that the Secretary of the Treasury afford an opportunity to present their oral views.

Plaintiff's counsel, by letters dated September 17 and 28, 1970, requested that the Commissioner of Customs conduct a full hearing in accordance with the adjudicatory provisions of the Administrative Procedure Act and the requirements of due process. The letters stated:

> "[W]e ask that you give us the Department of the Treasury's assurance that a hearing will be held which will include the following minimum due process safeguards:
>
> "1. All testimony will be given under oath.
>
> "2. All evidence which is introduced, either oral or written, will be on the record.
>
> "3. Treasury's LTFV determination will be based solely on the record of the hearing and will contain detailed findings of fact and a detailed statement of reasons for its conclusion.
>
> "4. As a directly affected American importer which must bear the burden of any dumping duty ultimately assessed, J. C. Penney will have the right:
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> (a) to call witnesses;

[16] 19 C.F.R. § 53.34; 35 Fed. Reg. 14100 (1970).

(b) to examine and/or cross-examine all persons who have had any connection with this case;

(c) to submit rebuttal evidence and argument; and

(d) to inspect all documentary evidence introduced by any participant at the hearing."

Plaintiff's counsel was advised by the Treasury Department by letter dated October 6, 1970, that their client and other interested parties would be afforded an opportunity to make oral presentation with respect to the withholding of the appraisement notice at a meeting to be held on October 14; that the meeting would be informal; that each interested party would be afforded one hour to make an oral presentation, and rebuttal, if required, would be permitted. The Treasury Department also took the position that the meeting was in furtherance of its conduct of the investigation under the Antidumping Act, and that the formal "hearing" requirements of the Administrative Procedure Act did not apply. The meeting was held on October 14 and attended by plaintiff's representatives.

As already noted, the Secretary of the Treasury is required to make his determination by December 4 as to whether or not the imported Japanese television sets have been sold by the importers at less than their fair value, and the relief which plaintiff here seeks would, among other matters, enjoin him from making that determination, whatever it may be, unless it is granted the hearing referred to in its demand as set forth above.

In addition to plaintiff's claim that the LTFV proceeding is of an adjudicatory nature, which requires application of the Administrative Procedure Act, and its further claim that its constitutional right to due process has been denied, plaintiff also charges that the defendants have prejudged the issue. The defendants deny all the plaintiff's claims; they seek dismissal of the complaint for lack of jurisdic-

tion over the subject matter and in any event urge that plaintiff has an adequate remedy at law.

[1] The ultimate question in the pending proceedings before the Treasury Department is whether a special dumping duty should be imposed upon imported Japanese television sets as a result of various statutory determinations yet to be made by the defendants. The investigation leading up to the required respective determinations by both the Secretary of the Treasury and the Tariff Commission is preliminary to any ultimate finding that dumping has occurred. Furthermore, it is only after both the Secretary of the Treasury and the Tariff Commission have made their affirmative determinations that the special dumping duty, if any, is imposed with respect to such imported merchandise in the event dumping margins are found to exist.[17] I am satisfied that since the appraised value of merchandise and the possible imposition of an additional duty is at issue, the matter is exclusively within the jurisdiction of the Customs Court and that this court is without jurisdiction. It may be conceded, and in fact is not disputed by the defendants, that if the antidumping procedures ultimately result in additional duties, the amounts, in view of the substantial importation of television sets by plaintiff, will run far in excess of $10,000. And since it asserts constitutional and statutory claims, plaintiff contends that the court has jurisdiction by virtue of section 1331 of Title 28, which provides:

> "§ 1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY; COSTS
>
> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

[17] 19 U.S.C. § 161.

However, this contention disregards section 1340 of Title 28, which provides:

> "§ 1340. INTERNAL REVENUE; CUSTOMS DUTIES
>
> "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

Also applicable, and negating jurisdiction in this court, is section 1582(a) of Title 28, United States Code, which defines the jurisdiction of the Customs Court:

> "§ 1582. JURISDICTION OF THE CUSTOMS COURT
>
> "(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; * * *."[18]

[2]. I agree with the observation made in Eastern States Petroleum Corp. v. Rogers,[19] with respect to section 1331:

> "Section 1331 vests federal question jurisdiction in the district courts and, unlike § 1340, contains no exception

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[18] As amended by § 110 of the Customs Courts Act of 1970, Pub. L. No. 91-271.

[19] 108 U.S. App. D.C. 63, 280 F. 2d 611, cert. denied, 364 U.S. 891, 81 S. Ct. 222, 5 L. Ed. 2d 187 (1960).

relating to Customs Court jurisdiction. But we do not agree that Congress' failure to provide an exception to § 1331 similar to that specified in § 1340 indicates an intent to open a loophole in its clear purpose to exclude customs cases from the district courts. When Congress provides a specific judicial remedy, relief may generally be accorded only through the specified procedure." [20]

Particularly apposite to the question of jurisdiction is North American Cement Corp. v. Anderson,[21] where Circuit Judge Edgerton wrote for a unanimous court. There, American cement manufacturers filed information with the Secretary of the Treasury and asked that he investigate whether cement imported from Norway was sold here at less than its fair value. The Secretary found to the contrary that Norwegian cement was not being sold in the United States. The American cement manufacturers thereupon sought declaratory and injunctive relief against the Secretary and the Commissioner of Customs. Their complaint was dismissed. Upon appeal the dismissal was affirmed, the court stating:

"In Morgantown Glassware Guild v. Humphrey [98 U.S.App.D.C. 375, 236 F.2d 670 (D.C.Cir), cert. denied, 352 U.S 896, 77 S.Ct. 133, 1 L.Ed.2d 87 (1956)], we read 28 U.S.C. § 1588 [22] as providing without limitation that ' "The Customs Court shall have exclusive jurisdiction to review on protest the * * * rate and amount

[20] *Id.* at 613.

[21] 109 U.S. App. D.C. 162, 284 F. 2d 591 (1960).

[22] § 15863 was one of the predecessors of the present "exclusive jurisdiction" statute, 28 U.S.C. § 1582, as amended by § 110 of the Customs Courts Act of 1970, Pub. L. No. 91-271 (June 2, 1970). The current statute restates the jurisdiction of the Customs Court as it previously appeared in 28 U.S.C. §§ 1582 and 1583. *See* S. Rep. No. 91-576, 91st Cong., 2d Sess. 16 (1970); 1970 U.S. Code Cong. & Admin. News, No. 6, at 1870. [footnote supplied.]

of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *'' ' 98 U.S.App.D.C. 375, 376, 236 F.2d 670, 671. In Boston Wool Trade Ass'n v. Snyder, we said: 'It is clear that the controversy concerns the duty to be imposed upon certain imports. As such, it is within the exclusive jurisdiction of the Court of Customs and Patent Appeals.' 82 U.S. App. D.C. 144, 145, 161 F.2d 648, 649. Even the question whether the Antidumping Act is constitutional has been held to be within the exclusive jurisdiction of the Customs Court. Horton v. Humphrey, D.C.D.C., 146 F.Supp. 819, affirmed, 352 U.S. 921, 77 S.Ct. 224, 1 L.Ed.2d 157.'' [23]

A recent statute, enacted by Congress in 1970,[24] as a new section in the Customs Courts Act, gives added support to the defendants' contention on the jurisdiction issue. This statute, 28 U.S.C., section 255, provides:

''§ 255. THREE-JUDGE TRIALS

''(a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Customs Court shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.'' [25]

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[23] 109 U.S. App. D.C. 162, 284 F. 2d 591, 592 (1960).

[24] Customs Courts Act of 1970, Pub. L. No. 91-271, § 108 June 2, 1970).

[25] The legislative history of the statute indicates that ''[t]he purpose of this provision is to permit broader representation of the court in deciding landmark or other important cases.'' 1970 U.S. Code Cong. & Admin. News, No. 6, at 1869. Both the plaintiff and American Importers Association, Inc., amicus curiae, stress that

[3, 4] Plaintiff argues that since no dumping tax has been assessed, it cannot file a protest [26] and invoke the jurisdiction of the Customs Court;[27] accordingly, it contends that this court should take jurisdiction under 28 U.S.C. section 1361, which vests the district courts with jurisdiction of mandamus actions to compel officers, employees or agencies of the United States to perform a duty owed to a plaintiff. The mandamus statute and the Administrative Procedure Act upon which plaintiff also relies do not confer jurisdiction where otherwise none exists.[28] The fact that the controversy may not be ripe for review by the Customs Court does not deprive that court of its exclusive jurisdiction and thereby vest this court with jurisdiction.[29]

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the issues here presented with respect to antidumping investigations and procedures before the Treasury Department are of critical importance to a substantial segement of the business community, and that the case involves a public interest much broader than the claims of the plaintiff in this case.

[26] Antidumping appeals and protests are made in the same manner as appeals, applications for review and protests relating to ordinary customs duties. 19 U.S.C. § 169, as amended by § 314 of the Customs Administrative Act of 1970, Pub. L. No. 91-271 (June 2, 1970); 19 C.F.R. § 53.54. *See also* 19 U.S.C. §§ 1514, 1515, as amended by §§ 207 and 208 of the Customs Administrative Act of 1970, Pub. L. No. 91-271 (June 2, 1970).

[27] 28 U.S.C. § 1582(a).

[28] *See* Sprague Elec. Co. v. Tax Court of United States, 230 F. Supp. 779, 781-782 (D. Mass. 1964), aff'd, 340 F. 2d 947 (1st Cir. 1965); Olin Industries, Inc. v. NLRB, 72 F. Supp. 225, 228 (D. Mass. 1947).

[29] *Cf.* Schilling v. Rogers, 363 U.S. 666, 670, 80 S. Ct. 1288, 4 L. Ed. 2d 1478 (1960); Morgantown Glassware Guild v. Humphrey, 98 U.S. App. D.C. 375, 236 F. 2d 670, cert. denied, 352 U.S. 896, 77 S. Ct. 133, 1 L Ed 2d 87 (1956); Sprague Elec. Co. v. Tax Court of United States, 230 F. Supp. 779 (D. Mass. 1964), aff'd, 340 F. 2d 947 (1st Cir. 1965); Olin Industries, Inc. v. NLRB, 72 F. Supp. 225, 228 (D. Mass. 1947).

The Customs Court, moreover, when its jurisdiction is properly invoked, is empowered to pass upon and consider all claims, statutory and constitutional, which would also embrace plaintiff's charge of prejudgment and prejudicial publicity.[30] And indeed the court itself has recognized its jurisdiction in this respect.[31] Virtually all the cases cited by plaintiff to support its position that the district court has power to grant injunctive relief against the denial of a constitutional right (or a right under the Administrative Procedure Act) in an administrative proceeding prior to

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[30] *Cf.* Morgantown Glassware Guild v. Humphrey, 98 U.S. App. D.C. 375, 236 F. 2d 670, 671, cert. denied, 352 U.S. 896, 77 S. Ct. 133, 1 L. Ed. 2d 87 (1956); Riccomini v. United States, 69 F. 2d 480, 483-484 (9th Cir. 1934); *see also* decision by Ryan, Ch. J., in Cresthill Industries v. Fowler, 66 Civ. 1658 (S.D.N.Y. 1966): "Invalidity by reason of procedural irregularity as well as by reason of substance is a dispute for that Court [Customs Court], as is the constitutionality of the act complained of [citing Morgantown Glassware Guild v. Humphrey, supra]"; *see also* Argosy, Ltd. v. Hennigan, 404 F. 2d 14, 20 (5th Cir. 1968); Kreutz v. Durning, 69 F. 2d 802, 803-804 (2d Cir. 1934); Horton v. Humphrey, 146 F. Supp. 819, 820-821 (D.D.C.) (3-judge court); aff'd without opinion, 352 U.S. 921, 77 S. Ct. 224, 1 L. Ed. 2d 557 (1956).

[31] *See* Elof Hansson, Inc. v. United States, 178 F. Supp. 922 (Cust. Ct. 1960), rev'd on other grounds, 296 F. 2d 779, 48 C.C.P.A. 91 (1961), cert. denied, 368 U.S. 899, 82 S. Ct. 179, 7 L. Ed. 2d 95 (1962) (holding Administrative Procedure Act applicable to proceedings under the Antidumping Act); Star-Kist Foods, Inc. v. United States, 169 F. Supp. 268 (Cust. Ct. 1958) (upholding the constitutionality of the Reciprocal Trade Agreements Act of 1934); *see also* Feltex Corp. v. Dutchess Hat Works, 71 F. 2d 322 (C.C.P.A. 1934) (holding Presidential proclamation valid under Antidumping Act); Kleberg & Co. v. United States, 71 F. 2d 332, 21 C.C.P.A. 110 (C.C.P.A. 1933) (upholding constitutionality of Antidumping Act); City Lumber Co. v. United States, 311 F. Supp. 340 (Cust. Ct. 1970) (upholding constitutionality of imposition of dumping duties under Antidumping Act).

the exhaustion of administrative remedies are cases outside of Customs Court jurisdiction.[32]

Other statutes also foreclose this court's jurisdiction of the subject matter of this suit. Section 7421 of the Internal Revenue Code of 1954[33] prohibits a suit "for the purpose of restraining the assessment or collection of any tax." So, too, the Declaratory Judgment Act, also cited by plaintiff as a basis for jurisdiction in this court, excepts controversies "with respect to Federal taxes."[34] In two cases, Cottman v. Dailey[35] and Horton v. Humphrey,[36] which involved the assessment of dumping duties, the courts considered respectively the foregoing statutes and in both instances decided that exclusive jurisdiction was in the Customs Court. Plaintiff, conceding the cases were correctly decided, seeks to distinguish them from the instant one on the ground that "[t]hose decisions required plaintiffs to seek relief in Customs Court because, at the time

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[32] *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963)); Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958); Skinner & Eddy Corp. v. United States, 249 U.S. 557, 39 S. Ct. 375, 63 L. Ed. 772 (1919); Medical Comm. for Human Rights v. SEC, 432 F. 2d 659 (D.C. Cir. 1970); Elmo Division of Drive-X Co. v. Dixon, 121 U.S. App. D.C. 113, 348 F. 2d 342 (1965); Amos Treat & Co. v. SEC, 113 U.S. App. D.C. 100, 306 F. 2d 260 (1962); Isbrandtsen Co. v. United States, 93 U.S. App. D.C. 293, 211 F. 2d 51 (1954); Lehigh Portland Cement Co. v. FTC, 291 F. Supp. 628 (E.D. Va. 1968), aff'd, 416 F. 2d 971 (4th Cir. 1969); Eisler v. Clark, 77 F. Supp. 610 (D.D.C. 1948).

[33] 26 U.S.C. § 7421.

[34] 28 U.S.C. § 2201.

[35] 94 F. 2d 85, 89 (4th Cir. 1938).

[36] 146 F. Supp. 819 (D.D.C.), aff'd, 352 U.S. 921, 77 S. Ct. 224, 1 L. Ed. 2d 157 (1956).

review was sought, the Customs Court had exclusive jurisdiction over their claims. In both cases, plaintiffs did not sue until the completion of the administrative proceeding, when Treasury had levied or was about to levy a dumping duty."[37]

The purported distinction is without substance. To permit plaintiff to maintain this suit in this court because it was commenced prior to a determination by the Secretary of the Treasury that there are or are likely to be sales of Japanese televisions at less than fair value—a prerequisite not only to a determination by the Tariff Commission of injury to industry, but also to the imposition thereafter of a dumping duty—would indeed be a neat way to circumvent the congressional purpose to prohibit suits to restrain the assessment of a tax. Moreover, it would also permit interference with Congress' "complete system of corrective justice with respect to matters arising under the customs law."[38]

The complaint is dismissed for lack of jurisdiction over the subject matter.

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[37] Plaintiff's memorandum of law, p. 59.

[38] Cottman Co. v. Dailey, 94 F. 2d 85, 88 (4th Cir. 1938).

APPENDIX C

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Dumping Investigation

§ 160. Initiation of investigation; injury determination; findings; withholding appraisement; publication in Federal Register

(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160-173 of this title called a "finding") of his determination and

the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the

affirmative or in the negative. May 27, 1921, c. 14, § 201, 42 Stat. 11; Sept. 1, 1954, c. 1213, Title III, § 301, 68 Stat. 1138; Aug. 14, 1958, Pub.L. 85-630, §§ 1, 4(b), 72 Stat. 583, 585.

Special Dumping Duty

§ 161. Amount of duty to be collected; determination of foreign market value of goods

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement report has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such

or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a(3) of this title is used in determining foreign market value.

then due allowance shall be made therefor.

(c) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that the fact that the exporter's sales price is the same as the foreign market value) is wholly or partly due to—.

(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markents of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a(3) of this title is used in determining foreign market value,

then due allowance shall be made therefor. May 27, 1921, c. 14, § 202, 42 Stat. 11; Sept. 1, 1954, c. 1213, Title III, § 302, 68 Stat. 1139; Aug. 14, 1958, Pub.L. 85—630, §§ 2, 4(b), 72 Stat. 583, 585.

Purchase Price

§ 162. Purchase price

For the purposes of this section and sections 160-171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States. May 27, 1921, c. 14, § 203, 42 Stat. 12.

§ 163. Determination of exporter's sales price

For the purpose of sections 160-171 of this title, the exporter's sales price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States. May 27, 1921, c. 14, § 204, 42 Stat. 13.

Foreign Market Value

§ 164. Determination of foreign market value

For the purposes of sections 160-171 of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of sections 160-171 of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 166 of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may

be used in determining the foreign market value. May 27, 1921, c. 14, § 205, 42 Stat. 13; Aug. 14, 1958, Pub.L. 85—630, § 3, 72 Stat. 584.

§ 165. Constructed value—Determination

(a) For the purposes of sections 160-171 of this title, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that (A) the amount for general expenses shall not be less than 10 per centum of the cost as defined in paragraph (1), and (B) the amount for profit shall not be less than 8 per centum of the sum of such general expenses and cost; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

Transactions Disregarded; Best Evidence

(b) For the purposes of this section, a transaction directly or indirectly between persons specified in any one of the paragraphs in subsection (c) of this section may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the paragraphs in subsection (c) of this section.

Persons Involved in Disregarded Transactions

(c) The persons referred to in subsection (b) of this section are:

(1) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;

(2) Any officer or director of an organization and such organization;

(3) Partners;

(4) Employer and employee;

(5) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting stock or shares of any organization and such organization; and

(6) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

May 27, 1921, c. 14, § 206, 42 Stat. 213; Aug. 14, 1958, Pub.L. 85—630, § 4(a), 72 Stat. 584.

Exporter

§ 166. Exporter defined

For the purposes of sections 160-171 of this title, the exporter of imported merchandise shall be the person by whom or for whose account the merchandise is imported into the United States:

(1) If such person is the agent or principal of the exporter, manufacturer, or producer; or

(2) If such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer; or

(3) If the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in any business conducted by such person; or

(4) If any person or persons, jointly or severally, directly or indirectly, through stock ownership or control or otherwise, own or control in the aggregate 20 per centum or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States and also 20 per centum or more of such power or control in the business of the exporter, manufacturer, or producer. May 27, 1921, c. 14, § 207, 42 Stat. 14.

Oaths and Bonds on Entry

§ 167. Oath and bond of person for whose account merchandise is imported before delivery thereof

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided

in section 160 of this title, and delivery of which has not been made by the collector before such finding has been so made public, unless the person by whom or for whose account such merchandise is imported makes oath before the collector, under regulations prescribed by the Secretary, that he is not an exporter, or unless such person declares under oath at the time of entry, under regulations prescribed by the Secretary, the exporter's sales price of such merchandise, it shall be unlawful for the collector to deliver the merchandise until such person has made oath before the collector, under regulations prescribed by the said Secretary, that the merchandise has not been sold or agreed to be sold by such person, and has given bond to the collector, under regulations prescribed by the Secretary, with sureties approved by the collector, in an amount equal to the estimated value of the merchandise, conditioned: (1) That he will report to the collector the exporter's sales price of the merchandise within thirty days after such merchandise has been sold or agreed to be sold in the United States; (2) that he will pay on demand from the collector the amount of special dumping duty, if any, imposed by sections 160-171 of this title, upon such merchandise; and (3) that he will furnish to the collector such information as may be in his possession and as may be necessary for the ascertainment of such duty, and will keep such records as to the sale of such merchandise as the Secretary may by regulation prescribe. May 27, 1921, c. 14, § 208, 42 Stat. 14.

Duties of Appraisers

§ 168. Appraisal and report to collector

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has

been so made public, it shall be the duty of each appraiser or person acting as appraiser, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of constructed value to the contrary notwithstanding) and report to the collector the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and any other facts which the Secretary may deem necessary for the purposes of sections 160-171 of this title. May 27, 1921, c. 14, § 209, 42 Stat. 15; Aug. 14, 1958, Pub.L. 85—630, § 4(b), 72 Stat. 585.

Appeals and Protests

§ 169. Appeals, etc., from determinations of appraisers

For the purposes of sections 160-171 of this title, the determination of the appraiser or person acting as appraiser as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law. May 27, 1921, c. 14, § 210, 42 Stat. 15; May 28, 1926, c. 411, § 1, 44 Stat. 669; Mar. 2, 1929, c. 488, § 1, 45 Stat. 1475; Aug. 14, 1958, Pub.L. 85—630, § 4(b), 72 Stat. 585.

§ 170. Special duties treated as regular duties

The special dumping duty imposed by sections 160-171 of this title shall be treated in all respects as regular customs duties within the meaning of all laws relating to the drawback of customs duties. May 27, 1921, c. 14, § 211, 42 Stat. 15.

§ 170a. Definitions

For the purposes of sections 160-171 of this title—

(1) The term "sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without regard to restrictions as to the disposition or use of the merchandise by the purchaser except that, where such restrictions are found to affect the market value of the merchandise, adjustment shall be made therefor in calculating the price at which the merchandise is sold or offered for sale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise under consideration, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise under consideration.

(3) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of sections 160-171 of this title can be satisfactorily made:

(A) The merchandise under consideration and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise under consideration.

(B) Merchandise which is identical in physical characteristics with, and was produced by another

person in the same country as, the merchandise under consideration.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and in the purposes for which used and (iii) approximately equal in commercial value to the merchandise under consideration.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

(E) Merchandise (i) produced in the same country and by the same person and of the same general class or kind as the merchandise under consideration, (ii) like the merchandise under consideration in the purposes for which used, and (iii) which the Secretary or his delegate determines may reasonably be compared for the purposes of sections 160-171 of this title with the merchandise under consideration.

(F) Merchandise which satisfies all the requirements of subdivision (E) except that it was produced by another person.

(4) The term "usual wholesale quantities", in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

May 27, 1921, c. 14, § 212, as added Aug. 14, 1958, Pub.L. 85—630, § 5, 72 Stat. 585.

Short Title

§ 171. Citation

Sections 160-171 of this title may be cited as the "Antidumping Act, 1921." May 27, 1921, c. 14, § 213, formerly § 212, 42 Stat. 15, renumbered Aug. 14, 1958, Pub. L. 85-630, § 5, 72 Stat. 585.

§ 172. Additional definitions

When used in sections 160-171 of this title—

The term "person" includes individuals, partnerships, corporations, and associations; and

The term "United States" includes all Territories and possessions subject to the jurisdiction of the United States, except the Virgin Islands, the islands of Guam and Tutuila, and the Canal Zone. May 27, 1921, c. 14, § 406, 42 Stat. 18; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

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§ 1514. Protest against collector's decisions

Except as provided in subdivision (b) of section 1516 of this title (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and con-

clusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. June 17, 1930, c. 497, Title IV, § 514, 46 Stat. 734.

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§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the per-

formance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 384.

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15 USC § 21

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall

have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decision of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

* * * * * * * * * *

15 USC § 78y. Court review of orders

(a) Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the United States Court of Appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and

enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 6, 1934, c. 404, § 25, 48 Stat. 901; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 10, 72 Stat. 945.

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15 USC § 1124. Importation of goods bearing infringing marks or names forbidden

No article of imported merchandise which shall copy or simulate the name of the[1] any domestic manufacture, or manufacturer, or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this chapter or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any customhouse of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trademarks and commercial names, may require his name and

[1] So in original.

residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark, issued in accordance with the provisions of this chapter, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the Department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark, and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs. July 5, 1946, c. 540, Title VII, § 42, 60 Stat. 440.

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21 USC § 332. Injunction proceedings—Jurisdiction of courts

(a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title, except paragraphs (e), (f), and (h)-(j) of said section.

Violation of injunction

(b) In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this chapter, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 387 of Title 28, as amended. June 25, 1938, c. 675, § 302, 52 Stat. 1043.

* * * * * * * * * *

§ 333. Penalties—Violation of section 331 of this title

(a) Any person who violates any of the provisions of section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment

for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

Same: with intent to defraud or mislead

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331 of this title, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

Exceptions in certain cases of good faith, etc.

(c) No person shall be subject to the penalties of subsection (a) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Secretary the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated section 331(a) or (d) of this title, if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 331(a) of this title, that such article is not adulterated or misbranded, within the meaning of this chapter designating this chapter or to the effect, in case of an alleged violation of section 331(d) of this title, that such article is not an article which may not, under the provisions of section 344 or 355 of this title,

be introduced into interstate commerce; or (3) for having violated section 331(a) of this title, where the violation exists because the article is adulterated by reason of containing a color additive not from a batch certified in accordance with regulations promulgated by the Secretary under this chapter, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the color additive, to the effect that such color additive was from a batch certified in accordance with the applicable regulations promulgated by the Secretary under this chapter; or (4) for having violated section 331(b), (c) or (k) of this title by failure to comply with section 352(f) of this title in respect to an article received in interstate commerce to which neither section 353(a) nor (b)(1) of this title is applicable, if the delivery or proffered delivery was made in good faith and the labeling at the time thereof contained the same directions for use and warning statements as were contained in the labeling at the time of such receipt of such article. June 25, 1938, c. 675, § 303, 52 Stat. 1043; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237, Oct. 26, 1951, c. 578, § 2, 65 Stat. 649; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; July 12, 1960, Pub.L. 86-618, Title I, § 105(b), 74 Stat. 403.

§ 334. Seizure—Grounds and jurisdiction

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355 of this title, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article

is found: "*Provided, however,* That no libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this chapter based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (2) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

Procedure; multiplicity of pending proceedings

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this

section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

Availability of samples of seized goods prior to trial

(c) The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized and a true copy of the analysis, if any, on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained.

Disposition of goods after decree of condemnation

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such

article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold: *Provided,* That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this chapter or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. If the article was imported into the United States and the person seeking its release establishes (1) that the adulteration, misbranding, or violation did not occur after the article was imported, and (2) that he had no cause for believing that it was adulterated, misbranded, or in violation before it was released from customs custody, the court may permit the article to be delivered to the owner for exportation in lieu of destruction upon a showing by the owner that all of the conditions of section 381(d) of this title can and will be met: *Provided, however,* That the provisions of this sentence shall not apply where condemnation is based upon violation of section 342(a) (1), (2), or (6), section 351(a) (3), section 352(j), or section 361(a) or (d) of this title: *And provided further,* That where such exportation is made to the original foreign supplier, then clauses (1) and (2) of section 381(d) of this title and the foregoing proviso shall not be applicable; and in all cases of exportation the bond shall be conditioned that the article shall not be sold or disposed of until the applicable conditions of section 381(d) of this title have been met. Any article condemned by reason of its being an article which may not, under section 344 or 355 of this title, be introduced into interstate commerce, shall be disposed of by destruction.

Costs

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

Removal of case for trial

(f) In the case of removal for trial of any case as provided by subsection (a) or (b) of this section—

(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed. June 25, 1938, c. 675, § 304, 52 Stat. 1044; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; June 24, 1948, c. 613, § 2, 62 Stat. 582; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 7, 1953, c. 350, § 3, 67 Stat. 477; Aug. 31, 1957, Pub.L. 85-250, 71 Stat. 567.

§ 335. Hearing before report of criminal violation

Before any violation of this chapter is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding. June 25, 1938, c. 675, § 305, 52 Stat. 1045; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631.

Procedure for establishment

21 USC

(e) (1) Any action for the issuance, amendment, or repeal of any regulation under section 341, 343(j), 344(a), 346, 351(b), or 352(d) or (h), of his title shall be begun by a proposal made (A) by the Secretary on his own initiative, or (B) by petition of any interested person, showing reasonable grounds therefor, filed with the Secretary. The Secretary shall publish such proposal and shall afford all interested persons an opportunity to present their views thereon, orally or in writing. As soon as practicable thereafter, the Secretary shall by order act upon such proposal and shall make such order public. Except as provided in paragraph (2) of this subsection, the order shall become effective at such time as may be specified therein, but not prior to the day following the last day on which objections may be filed under such paragraph.

(2) On or before the thirtieth day after the date on which an order entered under paragraph (1) of this subsection is made public, any person who will be adversely affected by such order if placed in effect may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Until final action upon such objections is taken by the Secretary under paragraph (3) of this subsection, the filing of such objections shall operate to stay the effectiveness of those provisions of the order to which the objections are made. As soon as practicable after the time for filing objections has expired the Secretary shall publish a notice in the Federal Register specifying those parts of the order which have been stayed by the filing of objections and, if no objections have been filed, stating that fact.

(3) As soon as practicable after such request for a public hearing, the secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence

relevant and material to the issues raised by such objections. At the hearing, any interested person may be heard in person or by representative. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public. Such order shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based. The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

Review of order

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e) of this section, any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeal for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of Title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to

be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to affirm the order, or set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with the law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

Copies of records of hearings

(g) A certified copy of the transcript of the record and proceedings under subsection (e) of this section shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, libel for condemnation, exclusion

of imports, or other proceedings arising under or in respect to this chapter, irrespective of whether proceedings with respect to the order have previously been instituted or become final under subsection (f) of this section. June 25, 1938, c. 675, § 52 Stat. 1055; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; June 25, 1948, c. 646, § 32, 62 Stat. 991; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Apr. 15, 1954, c. 143, § 2, 68 Stat. 55; Aug. 1, 1956, c. 861, § 2, 70 Stat. 919; Aug. 28, 1958, Pub. L. 85-791, § 21, 72 Stat. 948, July 12, 1960, Pub. L. 86-618, Title I, § 103(a)(4), 74 Stat. 398.

§ 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such persons is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

Aug. 16, 1954, c. 736, 68A Stat. 876; Nov. 2, 1966, Pub. L. 89-719; Title I, § 110(c), 80 Stat. 1144.

28 USC § 255. Publication of decisions

All decisions of the Customs Court shall be preserved and open to inspection. The court shall forward copies of judgment or decree may be granted, after reasonable no-

each decision to the Secretary of the Treasury and the collector for the district in which the case arose. The Secretary shall publish weekly such decisions as he or the court may designate and abstracts of all other decisions.

June 25, 1948, c. 646, 62 Stat. 900.

28 USC § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provisions therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

§ 1340. Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court. June 25, 1948, c. 646, 62 Stat. 932.

28 USC § 1337. Commerce and anti-trust regulations

The district courts shall have jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

28 USC § 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub. L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

§ 1582. Review of reappraisement; remission of duties

The Customs Court shall have exclusive jurisdiction of appeals for reappraisement and applications for review of reappraisement of imported merchandise and petitions for remission of additional duties filed under the customs laws. June 25, 1948, c. 646, 62 Stat. 943.

28 USC § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 USC § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug.

28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160(e) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (e) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

19 CFR § 153.53. Release of merchandise; Bond

When the district director of Customs in accordance with section 153.34(c) has received a notice of withheld appraisement or when he has been advised of a finding provided for in section 153.40, and so long as such notice or finding is in effect, he shall withhold release of any merchandise of a class or kind covered by such notice or finding which is then in his custody or is thereafter imported, unless an appropriate bond is filed or is on file, as specified hereafter in section 153.54, or unless the merchandise covered by a specified entry will be appraised without regard to the Antidumping Act, 1921, as amended.

§ 153.54. Type of bond required

(*a*) *General.* If the merchandise is of a class or kind covered by a notice of withheld appraisement provided for in section 153.48(*a*) or by a finding provided for in section 153.40, a single consumption entry bond covering the shipment, in addition to any other required bond, shall be furnished by the person making the entry or withdrawal, unless

(1) a bond is required under paragraph (*b*), or

(2) in cases in which there is not such requirement the district director of Customs is satisfied that the bond under which the entry was filed is sufficient.

The face amount of any additional bond required under this paragraph shall be sufficient to assure payment of any special duty that may accrue by reason of the Antidumping Act, but in no case shall be for less than $100.

(*b*) *Bond on Customs Form 7591.* If the merchandise is of a class or kind covered by a finding provided for in section 153.40 and the importer or his agent has filed a certificate on Form 3 (section 153.49), the bond required by section 208 of the Antidumping Act, 1921 (19 U.S.C. 167), shall be on Customs Form 7591. In such case, a separate bond shall be required for each entry or withdrawal, and such bond shall be in addition to any other bond required by law or regulation. The record of sales required under the conditions of the bond of Customs Form 7591 shall identify the entry covering the merchandise and show the name and address of each purchaser, each selling price, and the date of each sale. The face amount of such bond shall be equal to the estimated value of the merchandise covered by the finding.

APPENDIX E

UNITED STATES TARIFF COMMISSION

TELEVISION RECEIVING SETS FROM JAPAN

Determination of Injury in Investigation No. AA1921-66
Under the Antidumping Act 1921, as Amended

TC Publication 367
Washington, D.C.
January 1971

UNITED STATES TARIFF COMMISSION

Chester L. Mize, *Chairman*
Glenn W. Sutton
Bruce E. Clubb
Will E. Leonard, Jr.
George M. Moore
J. Banks Young

Kenneth R. Mason, *Secretary*

Address all communications to
United States Tariff Commission
Washington, D. C. 20436

UNITED STATES TARIFF COMMISSION
WASHINGTON

[AA1921-66]

TELEVISION SETS FROM JAPAN

Determination of Injury

The Assistant Secretary of the Treasury advised the Tariff Commission on December 4, 1970, that television receiving sets, monochrome and color, from Japan are

being, and are likely to be, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. In accordance with the requirements of section 201(a) of the Antidumping Act (19 U.S.C. 160(a)), the Tariff Commission instituted Investigation No. AA1921-66 to determine whether an industry in the United States is being, or is likely to be, injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

A public hearing was held on January 26-28, 1971. Notice of the investigation and hearing was published in the *Federal Register* of December 10, 1970 (35 F.R. 18768).

In arriving at a determination in this case, the Commission gave due consideration to all written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission's staff from questionnaires, personal interviews, and other sources.

On the basis of the investigation, the Commission determined unanimously[1] that an industry in the United States is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.

Statement of Reasons

In the Commission's judgment, an industry in the United States is being injured by reason of the importation of television receivers from Japan, which are being sold at less than fair value (LTFV) within the meaning of the Antidumping Act, 1921, as amended.

In reaching this determination, three reasons have been persuasive: (1) Imports of television receivers from Japan,

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[1] Chairman Mize did not participate in the determination.

determined by the Treasury to have been sold at less than fair value, have increased and now supply a substantial share of the U.S. market; (2) the sellers of the LTFV Japanese receivers have for the most part undersold U.S. manufacturers of television sets in the domestic market; and (3) sales of the LTFV television sets have contributed substantially to declining prices of domestically produced televisions receivers.

The industry

The Commission has considered the injured industry to consist of the facilities in the United States for the production of television receivers. Television sets are currently manufactured in the United States by approximately 20 firms, most of which produce both monochrome and color sets in a wide range of screen sizes.

The imported product

Except for console-type television receivers, few of which are imported into the United States, imported television sets from Japan cover the broad range of types and sizes sold in the U.S. market. Both monochrome and color receivers in nearly all screen sizes are imported into the United States from Japan in large volume.

The U.S. market

Annual sales of television receivers in the United States ranged between 5.1 million and 7.6 million sets during the 1950's and early 1960's; they rose appreciably in the mid-1960's with the advent of color television and averaged about 12.5 million sets in recent years. Sales in 1970 (12.2 million sets) were somewhat lower than those in the 2 preceding years (12.8-12.9 million sets).

In the past 3 years (1968-70), the U.S. market has been divided about equally between monochrome and color sets; annual sales of the monochrome sets have generally accounted for about 55 percent of total sales, and color sets, for 45 percent. Monochrome sets have been sold in substantial volume in a wide range of screen sizes, while color sets have been sold primarily in the larger screen sizes. In recent years, however, U.S. market demand for both monochrome and color receivers has shifted appreciably toward receivers having smaller screens. In 1970, for example, sales in the United States of monochrome receivers having screen sizes of 13 inches or less accounted for about 45 percent of total sales of monochrome sets, compared with 20 percent in 1965. Sales of large color receivers (screens of 20 inches or more) accounted for nearly 95 percent of total sales of color sets in 1965, but only 50 percent in 1970.

The competition in the U.S. market between domestic and Japanese television receivers has been sharpest in the middle screen sizes. Nearly all of the very large television sets sold in the United States have been produced domestically, while the great bulk of the very small sets have been imported. The market for receivers in sizes between those extremes, however, has been supplied by both Japaneses and U.S. producers. Television sets in the middle sizes—i.e., sets having screens larger than 9 inches but less than 20 inches—accounted for more than half of the output of domestic receivers and nearly three-fourths of the imports of Japanese receivers in 1970. Thus, the competition in the U.S. market between the Japanese and the domestically produced middle-sized receivers affects a great part of U.S. production.

Data on the number of television sets produced in the United States and imported from Japan in 1965-70 are given in the following table.

Television receivers: U.S. production and imports from Japan, 1965-70

(Thousand units)

Description	1965	1966	1967	1968	1969	1970
Monochrome:						
Not over 13"						
U.S. production	1,166	1,376	949	1,016	831	640
Imports from Japan	575	632	791	1,164	1,594	1,724
Over 13", not over 16"						
U.S. production	511	610	405	408	478	329
Imports from Japan	141	158	110	158	212	206
Over 16"						
U.S. production	5,401	4,626	2,688	3,133	2,301	2,132
Imports from Japan	17	59	116	114	251	344
Color:						
Not over 16"						
U.S. production	33	233	332	444	550	558
Imports from Japan	24	13	121	404	467	492
Over 16"						
U.S. production	2,576	4,548	4,886	4,802	4,624	3,744
Imports from Japan	10	160	130	209	375	310

Market penetration

U.S. imports of Japanese television receivers have increasingly penetrated the U.S. market. In 1970, Japan supplied about 28 percent of the apparent U.S. consumption of television receivers, compared with 10 percent in 1965. In the more recent year, 36 percent of apparent consumption

of monochrome receivers, and 16 percent of apparent consumption of color sets, consisted of Japanese receivers.

Substantial market penetration by Japanese television receivers has occurred in all of the middle screen sizes. Imports from Japan of monochrome sets having 10- to 13-inch screens, for example, increased rapidly in recent years; the imports supplied about 50 percent of the U.S. market in 1970, compared with 25 percent in 1965. Imports from Japan of monochrome sets having 17- to 19-inch screens accounted for 1 percent of the domestic market for such sets in 1965, but more than 15 percent in 1970. Aggregate U.S. production of monochrome receivers in the middle screen-size groups in 1970 was less than half of that in 1965, evidencing both lost production and lost jobs. While this decline reflects in part the substitution of color for monochrome sets, it resulted in substantial part from the increasing imports of LTFV sets from Japan. In its investigation the Treasury found that the bulk of the Japanese monochrome sets having 10- to 16-inch screens, accounting for about a fourth of total supply of middle-sized monochrome receivers in the U.S. market, were sold at less than fair value.

Although the pattern of import penetration has been more erratic for color sets than for monochrome sets, imports from Japan of color sets have generally increased since 1965 and have taken a marked share of the U.S. market in the middle screen sizes. The Japanese share of the U.S. market for middle-sized color receivers was about 30 percent in 1970. In its investigation the Treasury found that virtually all of the Japanese color receivers having 14- to 19-inch screens, accounting for about a fifth of total supply of middle-size color receivers in the U.S. market, were sold at less than fair value.

Price effects

Information obtained by the Commission in the investigation indicates that the bulk of the television receivers imported from Japan have been sold in recent years in the United States at prices significantly lower than the prices of comparable domestic television receivers. Such underselling has been concentrated in certain of the middle screen sizes—the market area where competition between the Japanese and domestic sets has been most substantial and direct. The price differences were found to exist when comparing weighted average prices of Japanese-produced and domestically produced television receivers within narrow screen-size categories, as well as in instances where virtually identical sets (i.e., sets having comparable screens, cabinets, circuitry, and automatic tuning devices) could be compared. The LTFV margins were often equivalent to a substantial part of the margin of underselling in the United States; in other instances, the LTFV margin was found to be greater than the margin of underselling. In any event, the ability of the Japanese suppliers to undersell domestic producers in the U.S. market appears to have been significantly enhanced as a result of the selling of Japanese sets at less than fair value. While margins of underselling in the U.S. market have generally diminished since 1967, perhaps in part as a response to the Treasury's investigation of allegations of LTFV sales, they have continued to be an important competitive factor in the market place.

Since 1967 the prices of major categories of domestically produced television receivers, both monochrome and color, have dropped substantially, particularly in the middle range of screen sizes. Weighted average prices of domestically produced sets in the middle screen sizes ranged as much as 25 percent lower in 1970 than in 1968. As indicated earlier, imports of television receivers from Japan at LTFV were a major factor in the U.S. market during that period,

supplying a substantial and increasing share of apparent consumption. Under these circumstances, the LTFV imports clearly contributed in substantial measure to the price deterioration that has occurred in the domestic market for television receivers.

Conclusion

In the Commission's judgment, the imports of television receivers from Japan, sold at LTFV, have adversely affected the prices of comparable domestically produced receivers in the United States, and have caused substantial loss of sales by U.S. producers. Accordingly, we have unanimously determined that an industry in the United States is being injured by reason of such LTFV imports.

APPENDIX F

Plaintiff's Exhibit Thirteen

NOTICES

DEPARTMENT OF THE TREASURY

BUREAU OF CUSTOMS

TELEVISION RECEIVING SETS FROM JAPAN

Withholding of Appraisement Notice

Information was received on March 22, 1968, that television sets, monochrome and color, from Japan were being sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended (19 U.S.C. 160 et seq.) (referred to in this notice as the Act). This information was the subject of an "Antidumping Proceeding Notice" which was published in the FEDERAL REGISTER of June 18, 1968, on page 8851. The "Antidumping Proceeding Notice" indicated that there was evidence on record concerning injury to or likelihood of injury to or prevention of establishment of an industry in the United States.

Pursuant to section 201(b) of the Act (19 U.S.C. 160(b)) notice is hereby given that there are reasonable grounds to believe or suspect that the purchase price or exporter's sales price (sections 203 and 204 of the Act; 19 U.S.C. 162 and 163) of such television receiving sets, monochrome, and color, from Japan is less, or likely to be less, than the foreign market value (section 205 of the Act; 19 U.S.C. 161).

Statement of reasons. The information currently before the Bureau tends to indicate that the probable basis of comparison will be between purchase price or exporter's sales price and adjusted home market price.

Preliminary analysis suggests that purchase price will probably be calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing, and other charges as applicable. It appears that the applicable Japanese commodity tax will be added to this price.

Exporter's sales price will probably be calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter, appropriate deductions will be made for inland freight in Japan, ocean freight and insurance, U.S. duty, brokerage charges, U.S. freight warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this, additions will probably be made for any applicable Japanese commodity tax refunded or not paid upon exportation of the merchandise.

Home market price will probably be based on the delivered price to distributors in the home market. Appropriate deductions appear to be warranted for discounts and rebates granted for cash, quantities, and certain sales promotions. Probable adjustment to be made to the net price will be for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. It appears that appropriate

adjustments will also be made for differences in the merchandise, and for differences in advertising and credit costs.

Using the above criteria, there are reasonable grounds to believe or suspect that purchase price or exporter's sales price will be lower than adjusted home market price.

Customs officers are being directed to withhold appraisement of television receiving sets, monochrome and color, from Japan in accordance with § 153.43, Customs Regulations (19 CFR 153.43).

In accordance with §§ 153.32(b) and 153.37, Customs Regulations (19 CFR 153.32(b), 153.37) interested parties may present written views or arguments, or request in writing that the Secretary of the Treasury afford an opportunity to present oral views.

Any such written views or arguments, or requests should be addressed to the Commissioner of Customs, 2100 K Street, N.W., Washington, D.C. 20226, in time to be received by his office not later than 14 days from the date of publication of this notice in the FEDERAL REGISTER.

This notice, which is published pursuant to § 153.34(b), Customs Regulations, shall become effective upon publication in the FEDERAL REGISTER. It shall cease to be effective at the expiration of 6 months from the date of such publication, unless previously revoked.

MYLES J. AMBROSE,
[SEAL] *Commissioner of Customs.*

Approved: August 28, 1970.

EUGENE T. ROSSIDES,
Assistant Secretary
of the Treasury.

[F.R. Doc. 70-11717; Filed, Sept. 3, 1970; 3:47 a.m.]

OFFICE OF THE SECRETARY

[Treasury Department Order No. 173-3, Amdt. 2]

U.S. SECRET SERVICE

Realignment of Headquarters Functions and Responsibilities

Pursuant to the authority vested in the Secretary of the Treasury, including the authority in Reorganization Plan No. 26 of 1950, and pursuant to the authority vested in me by Treasury Department Order No. 190, Revision No. 4, the first paragraph of Treasury Department Order No. 173-3 is amended to read as follows:

By virtue of the authority vested in me as Secretary of the Treasury, including the authority in Reorganization Plan No. 26 of 1950, the following offices are hereby established in the Headquarters of the United States Secret Service:

Director.
Deputy Director.
Assistant Director (Protective Intelligence).
Assistant Director (Investigations).
Assistant Director (Protective Forces).
Assistant Director (Administration).
Assistant Director (Inspection and Audit).
Counsel.
Assistant to the Director (Public Affairs).

Dated: August 27, 1970.

EUGENE T. ROSSIDES,
Assistant Secretary for Enforcement Operations.

[SEAL]

[F.R. Doc. 70-11718; Filed, Sept. 3, 1970; 8:47 a.m.]

DEPARTMENT OF DEFENSE

OFFICE OF THE SECRCTARY OF DEFENSE

[DOD Directive 5148.6]

ASSISTANT TO THE SECRETARY OF DEFENSE (TELECOMMUNICATIONS)

Organizational Statement

The Deputy Secretary of Defense approved the following May 21, 1970:

I. *General.* Pursuant to the authority vested in the Secretary of Defense and the provisions of the National Security Act of 1947, as amended, including the DOD Reorganization Act of 1958, the position of Assistant to the Secretary of Defense (Telecommunications) is hereby established with responsibilities, functions, and authorities as prescribed herein.

II. *Responsibilities.* The Assistant to the Secretary of Defense (Telecommunications) is the principal staff assistant to the Secretary of Defense on telecommunications matters. He is also the principal assistant to the Secretary of Defense for the National Communications System.

III. *Functions.* Under the direction, authority and control of the Secretary of Defense, the Assistant to the Secretary of Defense (Telecommunications) shall perform the following functions:

A. *General.* 1. Serve as the principal staff assistant to the Secretary of Defense for telecommunications matters.

2. Act as DOD coordinator in the area of telecommunications, including telecommunications for, but not the function of, command and control.

3. Review JCS, Military Department and DOD component validated telecommunications requirements to reaffirm the need thereof, including priorities for their fulfillment, and recommend alternatives as appropriate.

4. Act as the DOD coordinator for those special telecommunications of a sensitive nature, e.g., those related to the support of intelligence functions.

APPENDIX G

Notices

DEPARTMENT OF THE TREASURY

Office of the Secretary

Television Receiving Sets, Monochrome and Color, From Japan

Determination of Sales at Less Than Fair Value

Information was received on March 22, 1968, that television receiving sets, monochrome and color, from Japan were being sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended (19 U.S.C. 160 et seq.) (referred to in this notice as "the Act").

A "Withholding of Appraisement Notice" issued by the Commissioner of Customs was published in the Federal Register of September 4, 1970.

I hereby determine that for the reasons stated below, television receiving sets, monochrome and color, from Japan are being, or likely to be, sold at less than fair value within the meaning of section 201(a) of the Act.

Statement of reasons on which this determination is based. The information currently before the Bureau reveals that the appropriate basis of comparison is between purchase price or exporter's sales price and adjusted home market price.

Purchase price was calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing, and other charges as applicable. The applicable Japanese commodity tax was added to this price.

Exporter's sales price was calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter, appropriate deductions were made for inland freight in Japan, ocean freight and insur-

ance, U.S. duty, brokerage charges, U.S. freight, warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this additions were made for any applicable Japanese commodity tax refunded or not paid upon exportation of the merchandise.

Home market price was based on the delivered price to distributors in the home market. Appropriate deductions were made for discounts and rebates granted for cash, quantities, and certain sales promotions. From the net price adjustments were made for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. Adjustments were also made for differences in the merchandise, and for differences in advertising and credit costs.

Purchase prices or exporter's sales prices were lower than home market prices by amounts that were more than minimal in relation to the total volume of sales.

The U.S. Tariff Commission is being advised of this determination.

This determination is being published pursuant to section 201(c) of the Act (19 U.S.C. 160(c)).

EUGENE T. ROSSIDES
Assistant Secretary of the Treasury.

[F.R. Doc. 70-16531; Filed, Dec. 4, 1970; 11:49 a.m.]